SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 173

JAMES B. MOORE, PETITIONER,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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1 IN THE UNITED STATES DISTRICT COURT

Northern District of Indiana

Fort Wayne Division

Pleas and Proceedings had before the Honorable Thomas W. Slick, Judge of the United States District Court, for the Northern District of Indiana, at a term of said court begun and held at the United States Court House, in the City of Fort Wayne, Indiana, to wit:

James B. Moore
vs.
The Chesapeake and Ohio Railway Company, a Corporation. } No. 402—At Law

Be it remembered that heretofore on the 15th day of January, 1931, the above named plaintiff by his attorneys, Teeter and Hartzler, of the City of Fort Wayne, Indiana, filed in the office of the Clerk of this court, his complaint in the above entitled cause, which complaint reads in the words and figures following, to wit:

an. 15, 2 • • (Caption) • •

COMPLAINT

Paragraph I

Comes now the plaintiff, James B. Moore, in the above entitled cause and for his first paragraph of complaint herein against the defendant, The Chesapeake and Ohio Ralway Company, says, that said defendant, The Chesapeake and Ohio Railway Company, at all times mentioned in this complaint was and now is a corporation duly organized and acting as such under and by virtue of the laws of the State of Virginia and was engaged at all times herein mentioned in the business of operating a steam railroad as a common carrier engaging in interstate commerce in and between and through the States of Virginia, West Virginia, Ohio, Indiana and Illinois; and, was doing business within the territorial limits of this, the United States District Court for the Northern District of Indiana, Fort Wayne Division, at the time of the commencement of this action, in which District and Division thereof aforesaid the defendant also operated its railroad at the time of the commencement of this action.

Plaintiff says that on November 29th 1930, and at the time of the occurrence of the grievances hereinafter complained of, he was employed as a yard switchman by, and was at work for, the defendant and engaged with the dedfendant in interstate commerce at the Russell Yard of the defendant lo-
3 cated at Russell in the State of Kentucky. That plaintiff brings this action against the defendant under and by virtue of an Act of Congress of the United States, approved April 22nd, 1908 and Amendments thereto, and which Act is commonly known as the Federal Employers Liability Act, and under a certain Act of the Congress of the United States known as the Safety Appliance Acts and the Rules and Orders lawfully promulgated there under by the United States Interstate Commerce Commission; That said Laws of the United States and Rules and Orders aforesaid were in full force and effect at all times herenafter mentioned; that said Laws of the United States give to this Court jurisdiction to hear and determine this cause of action as herein set forth.

Plaintiff says, that at all times herein mentioned, the defendant maintained and operated a yard at Russell, Kentucky, known as the Russell yard for the purpose of making

up its trains, classifying cars, and inspecting for repairs the cars used on its railroad; and also maintained a track in said yard known as Shop Track No. 2 for the purpose of placing thereon the cars used on its railroad and making "running" repairs thereto in order to enable said cars to continue their movements in inter-state commerce. That said Shop track extended in a general east and west direction.

Plaintiff further says that on or about November 29th 1930, in the morning thereof, pursuant to the order and direction of the defendant, and while engaged in the regular course of his employment with the defendant, he was assisting in switching freight cars from off the Shop Track easterly thereover and onto the defendant's classifying tracks in said Yard for the following purposes, to wit:—placing cars into trains so that said cars could continue their original movements in inter-state commerce, which original movements in inter-state commerce were temporarily interrupted at said Yard for the purpose of making "running" repairs to said cars: placing cars into trains for the purpose of moving said cars from Russell, Kentucky to points in the State of West Virginia, Virginia and other States of the United States:

4 placing cars in trains for the purpose of continuing the movements of said cars in inter-state commerce from Ohio, Illinois, Indiana and other States of the United States to their destination in the State of Kentucky, and for the further purpose of clearing said Shop Track No. 2 of the aforesaid cars in order that plaintiff could assist his crew in the movement of other cars from track No. 18 in said Yard to said Shop Track No. 2, which latter movement was to follow immediately upon the clearing of the cars off of the Shop Track as aforesaid, and which movement of the cars on said No. 18 track onto the Shop Track was for the purpose of making "running" repairs to said cars in order that said cars could continue their original movements in inter-state commerce from Ohio, Indiana, Illinois, Virginia, West Virginia, Kentucky, and other States of the United States to their destinations.

Plaintiff says that the cars on said Shop Track No. 2 were being switched easterly thereover. That in the regular line of his duties he undertook to uncouple the head or lead car from the rest of the cars by operating the "Uncoupling-Lever" of the car coupled behind the lead car. That said "Uncoupling-Lever" was a part and appurtenance of the Coupler of said car. That said "Uncoupling-Lever" was of

the type known as a "Push-Down" Uncoupling-lever. That the normal, ordinary and usual way to use said lever was to take hold of the handle of said lever with one hand and by manual force applied thereto push the handle of the lever down, which in turn would ordinarily, usually and normally pull up the "Lock-block," also commonly known as the "pin," up out of the connected couplers so as to release the coupler knuckles, thereby disengaging the couplers, and affecting an uncoupling of the cars in the normal, usual and ordinary way. That, while said cars were in motion, plaintiff did take hold of the handle of the lever aforesaid with one hand, and did by the application of manual force thereto push down said lever handle in the usual, ordinary and normal way aforesaid, but that said use and operation of the lever handle and lever aforesaid failed to pull up the lock-block or pin so as to release the knuckles of the couplers, failed to disengage the couplers, and failed to effect an uncoupling of the cars. That when plaintiff pushed down as aforesaid the handle of the lever, it dropped more than fifteen inches though operated by the plaintiff in the normal, usual and ordinary way, and said handle further descended to a point less than eighteen inches from the top of the rail without engaging the "lock-block" so as to release the knuckles, and said lever handle further descended inward towards and over the wheel of the car. That said lever, its parts and appurtenances, were bent, twisted and defective in condition, and prevented and interfered with the normal, usual and ordinary functioning of the coupler of said car, and further prevented the lock-block from being pulled up out of the couplers so as to release the knuckles and disengage the couplers. That the descent of the lever handle, by reason of the bent, twisted and defective condition and placement of the lever and its parts and appurtenances, caused the plaintiff's body to go between the end of the cars while plaintiff was undertaking to effect an uncoupling of the cars in the nrmal, usual and ordinary way, as aforesaid, and by reason thereof and also by reason of the descent of the handle to less than eighteen inches above the rail as aforesaid, the plaintiff was caused to become unbalanced and his right hand and arm to be caught by and under the wheels of the car and to be crushed and so mangled as to require the amputation thereof, and this plaintiff to be further injured in his body and person as hereinafter more fully described.

Plaintiff says that the direct and proximate cause of his injuries as hereinafter set out was the unlawful and negligent

conduct of the defendant in the matters and respects as follows:—

1. Said defendant used and permitted to be used on its railroad aforesaid a car equipped with a "push-down" type of uncoupling lever, a part and appurtenance of the coupler, the handle of which lever when operated in the ordinary, usual and normal way descended to a point less than eighteen inches from or above the top of the rail without causing or engaging the "lock-block" or pin to release the knuckle.

6 2. Said defendant used and permitted to be used on its aforesaid railroad a car equipped with a "push-down" type of uncoupling lever, a part and appurtenance of the coupler, the handle of which lever when operated in the usual, normal and ordinary way dropped more than fifteen inches over all.

3. Said defendant unlawfully used and permitted to be used on its aforesaid railroad a car whose Uncoupling Lever, its parts and appurtenances, were bent, twisted and defective in condition and placement, and which by reason of the aforesaid, and when used in the normal, usual and ordinary manner, interfered with and prevented the lock-block or pin from or releasing the knuckle of the coupler and, prevented an uncoupling of the cars in the usual, normal and ordinary way.

4. Said defendant unlawfully used and permitted to be used on its aforesaid railroad a car whose uncoupling lever, its parts and appurtenances, were bent, twisted and defective in condition and placement, and which by reason of the aforesaid, and when used and operated in the usual, normal and ordinary way, prevented the coupler from being uncoupled without the necessity of a man going between the ends of the cars in order to affect said uncoupling.

5. Said defendant unlawfully used and permitted to be used on its aforesaid railroad a car, the coupler of which when coupled to another car, could not be uncoupled in the usual, normal and ordinary way without the necessity of a man going between the ends of the cars, to effect said uncoupling.

6. Said defendant unlawfully used and permitted to be used on its aforesaid railroad a car not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of a man going between the ends of the cars.

Plaintiff says that as a direct and proximate result of the

negligence and unlawful conduct of the defendant, as hereinbefore set out, he was caused to be injured in his body and person in the following respects;—an amputation of the right hand and forearms, said amputation consisting of and including the lower third of the forearm; a crushing and mangling of the bones, muscles, ligaments, nerves and tendons of the right forearm, with a resultant condition of pain, tenderness and swelling in said right forearm. That said paid is constant, aching in character, radiates toward the right shoulder and is more intense when said right forearm is moved or manipulated: that plaintiff has wholly lost the use of his right arm and hand: that there is being formed what is known as neuromata on the ends of the nerves. That amputation tumors are developing on the ends of the severed nerves of the right forearm: that there is further developing in said right forearm and bones thereof a condition of catocmyelitis, with a resultant destruction of the said bone and a spreading, thru the osseous system, of said condition of cateomylitis to the other bones of the body, producing necrotic areas of bone complicated with abscesses and septicaemia; That plaintiff has been caused a severe shock and injury to his entire nervous system; that his aforesaid injuries are permanent in character and that with reasonable certainty he will be caused to suffer paid in the future therefrom; that his aforesaid injuries have and will cripple him for live.

Plaintiff says that at the time of the occurrence of the matters complained of he was a healthy vigorous man, working and able to work, earning and able to earn the sum of approximately two hundred dollars ($200.00) a month at his occupation of a railroad switchman. That since his aforesaid injuries he has been unable to work and earn money, and will with reasonable certainty be wholly incapacitated in his ability to perform the work of a switchman or any other occupation and earn money in the future. That he will be forced to expend moneys for medical care and treatment of his injuries in the future, the exact amount of which plaintiff is unable to state at this time.

Wherefore plaintiff, having been damaged in his body and person and in his earning capacity in the sum of seventy seven thousand six hundred dollars ($77,600.00), asks and prays judgment against the defendant, The Chesapeake and Ohio Railway Company, in the sum of seventy seven thousand six hundred ($77,600.00) dollars, and all other and proper relief in the premises.

Paragraph II

Comes now the plaintiff, James B. Moore, in the above entitled cause and for his second paragraph of complaint herein against the defendant, The Chesapeake and Ohio Railway Company, says, that said defendant, The Chesapeake and Ohio Railway Company, at all times mentioned in this complaint was and now is a corporation duly organized and acting as such under and by virtue of the laws of the State of Virginia and was engaged at all times herein mentioned in the business of operating a steam railroad as a common carrier engaging in interstate commerce in and between and through the States of Virginia, West Virginia, Ohio, Indiana and Illinois; that the plaintiff is a resident of the City of Fort Wayne, in Allen County in the State of Indiana; and is a citizen of the State of Indiana. That the amount in controversy herein exceeds the sum of three thousand ($3000.00) dollars exclusive of costs and interest. That this is an action between the plaintiff, a citizen of the State of the State of Indiana, and the defendant, a citizen of the State of Virginia; that at all times herein mentioned and at the time of the commencement of this action, this defendant operated its railroad and did business within the territorial limits of this the United States District Court for the Northern District of Indiana, Fort Wayne Division.

Plaintiff says that on November 29th 1930, and at the time of the occurrence of the grievances hereinafter complained of, he was employed as a yard switchman by and was at work for the defendant and engaged with the defendant in intrastate commerce at the Russell Yard of the defendant located at Russell in the State of Kentucky. That plaintiff brings this action against the defendant under and by virtue of an Act of the Congress of the United States commonly known as the Safety Appliance Acts and, the Rules and Orders promulgated by the Interstate Commerce Commission of the
9 United States and also under the Laws of the State of Kentucky in which State, to-wit Kentucky, this cause of action arose: That said Laws of the United States and Rules and Orders aforesaid and Laws of the State of Kentucky, which Laws of the State of Kentucky are hereinafter set out, were in full force and effect at all times hereinafter mentioned; That said Laws of the State of Kentucky, in full force and effect and governing the rights of the parties hereto at the time of the matters complained of herein, are as follows:

Sec. 82 Ob-1. Railroads liable for injury or death of employees due to negligence.

That every common carrier by railroad while engaged in commerce in this state shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, to his or her personal representative for such injury or death to such employee resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, docks, boats, wharves or other equipment. (March 26, 1918. c 52, p. 153, Sec. 1).

Sec. 820b-2. Contributory negligence pleaded in diminution of damages; not competent where safety statute violated.

In all actions hereafter brought against such common carrier by railroad, or by virtue of any of the provisions of this act to recover damages for personal injury to any employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; provided, that no such employee who may have been injured or killed shall be held to have been guilty of contributory negligence in any case where the violation of such common carrier of any statute, state or federal, enacted for the safety of employees contributed to the injury or death of such employee. (Id. Sec. 2.)

Sec. 830b-3. Employee does not assume risk where safety statute is violated.

That in any action brought against any common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any employee, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute, state or federal, enacted for the safety of employee, contributed to the injury or death of such employee. (Id. Sec. 3)

Plaintiff says, that at all times herein mentioned, the defendant maintained and operated a yard at Russell, Kentucky, known as the Russell Yard for the purpose of making up its trains, classifying cars, and inspecting for repairs the cars used on its railroad; and also maintained a track in said yard known as Shop Track No. 2 for the purpose of placeing thereon the cars used on its railroad and mak-

ing "running" repairs thereto in order to enable said cars to continue their movements in intra-state commerce. That said Shop track extended in a general east and west direction.

Plaintiff further says that on or about November 29th, 1930, in the morning thereof, pursuant to the order and direction of the defendant, and while engaged in the regular course of his employment with the defendant, he was assisting in switching freight cars from off the Shop Track easterly thereover and onto the defendant's classifying tracks in said Yard for the following purposes, to wit: placing cars into trains so that said cars could continue their original movements in the State of Kentucky in intra-state commerce, which original movements in intrastate commerce were temporarily interrupted at said Yard for the purpose of making "running" repairs to said cars; placing cars into trains for the purpose of moving said cars from Russell, Kentucky to other points in the State of Kentucky; and for the further purpose of clearing said Shop Track No. 2 of the aforesaid cars in order that plaintiff could assist his crew in the movement of other cars from track No. 18 in said Yard to said Shop Track No. 2, which latter movement was to follow immediately upon the clearing of the cars off of the Shop Track as aforesaid, and which movement of the cars on said No. 18 track onto the Shop Track was for the purpose of making "running" repairs to said cars in order that said cars could continue their original movements in intra-state commerce, in the State of Kentucky.

Plaintiff says that the cars on said Shop Track No. 2 were being switched easterly thereover. That in the regular line of his duties he undertook to uncouple the head or lead car from the rest of the cars by operating the "Uncoupling-Lever" of the car coupled behind the lead car. That said "Uncoupling-Lever" was a part and appurtenance of the Coupler of said car. That said "Uncoupling-Lever" was of the type known as a "Push-down" Uncoupling-Lever. That the normal, ordinary and usual way to use said lever was to take hold of the handle of said lever with one hand and by manual force applied thereto push the handle of the lever down, which in turn would ordinarily, usually and
11 normally pull up the "Lock-block", also commonly known as the "pin", up out of the connected couplers so as to release the coupler knuckles, thereby disengaging the couplers, and effecting an uncoupling of the cars in the normal, usual and ordinary way. That, while said cars were in motion,

plaintiff did take hold of the handle of the lever aforesaid with one hand, and did by the application of manual force thereto push down said lever handle in the usual, ordinary and normal way aforesaid, but that said use and operation of the lever handle and lever aforesaid failed to pull up the "Lock-block" or "pin" so as to release the knuckles of the couplers, failed to disengage the couplers, and failed to effect an uncoupling of the cars. That when plaintiff pushed down as aforesaid the handle of the lever, it dropped more than fifteen inches though operated by the plaintiff in the normal, usual and ordinary way, and said handle further descended to a point less than eighteen inches from the top of the rail without engaging the "Lock-block" so as to release the knuckles, and said lever handle further descended inward towards and over the wheel of the car. That said lever, its parts and appurtenances, were bent, twisted and defective in condition, and prevented and interfered with the normal, usual and ordinary functioning of the coupler of said car, and further prevented the "lock-block" from being pulled up out of the couplers so as to release the knuckles and disengage the couplers. That the descent of the lever handle, by reason of the bent, twisted and defective condition and placement of the lever and its parts and appurtenance, caused the plaintiff's body to go between the ends of the cars while plaintiff was undertaking to effect an uncoupling of the cars in the normal, usual and ordinary way, as aforesaid, and by reason thereof and also by reason of the descent of the handle to less than eighteen inches above the rail as aforesaid, the plaintiff was caused to become unbalanced and his right hand and arm to be caught by and under the wheels of the car and to be crushed and so mangled as to require the amputation thereof, and this plaintiff to be further injured in his body and person as hereinafter more fully described.

Plaintiff says that the direct and proximate cause of
12 his injuries as hereinafter set out was the unlawful and negligent conduct of the defendant in the matters and respects as follows:

1. Said defendant used and permitted to be used on its railroad aforesaid a car equipped with a "push-down" type of uncoupling lever, a part and appurtenance of the coupler, the handle of which lever when operated in the ordinary, usual and normal way descended to a point less than eighteen inches from or above the top of the rail without causing or engaging the "lock-block" or pin to release the knuckle.

2. Said defendant used and permitted to be used on its aforesaid railroad a car equipped with a "push-down" type of uncoupling lever, a part and appurtenance of the coupler, the handle of which lever when operated in the usual, normal and ordinary way dropped more than fifteen inches over all.

3. Said defendant unlawfully used and permitted to be used on its aforesaid railroad a car whose "Uncoupling-Lever", its parts and appurtenances, were bent, twisted and defective in condition and placement, and which by reason of the aforesaid, and when used in the normal, usual and ordinary manner, interfered with and prevented the "lock-block" or pin from or releasing the knuckle of the coupler and, prevented an uncoupling of the cars in the usual, normal and ordinary way.

4. Said defendant unlawfully used and permitted to be used on its aforesaid railroad a car whose uncoupling lever, its parts and appurtenances, were bent, twisted and defective in condition and placement, and which by reason of the aforesaid, and when used and operated in the usual, normal and ordinary way, prevented the coupler from being uncoupled without the necessity of a man going between the ends of the cars in order to effect said uncoupling.

5. Said defendant unlawfully used and permitted to be used on its aforesaid railroad a car, the coupler of which when coupled to another car, could not be uncoupled in the usual, normal and ordinary way without the necessity of a man going between the ends of the cars, to effect said uncoupling.

13 6. Said defendant unlawfully used and permitted to be used on its aforesaid railroad a car not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of a man going between the ends of the cars.

Plaintiff says that as a direct and proximate result of the negligence and unlawful conduct of the defendant, as hereinbefore set out, he was caused to be injured in his body and person in the following respects: an amputation of the right hand and forearm, said amputation consisting of and including the lower third of the forearm; a crushing and mangling of the bones, muscles, ligaments, nerves and tendons of the right forearm, with a resultant condition of pain, tenderness and swelling in said right forearm. That said pain is constant, aching in character, radiates toward the right shoulder and is more intense when said right forearm is moved or

manipulated; that plaintiff has wholly lost the use of his right arm and hand; that there is being formed what is known as neuromata on the ends of the nerves. That amputation tumors are developing on the ends of the severed nerves of the right forearm; that there is further developing in said right forearm and bones thereof a condition of osteomyelitis, with a resultant destruction of the said bone and a spreading, thru the caseous system, of said condition of osteomylitis to the other bones of the body, producing necrotic areas of bone complicated with abscesses and espticamia; That plaintiff has been caused a severe shock and injury to his entire nervous system; that his aforesaid injuries are permanent in character and that with reasonable certainty he will be caused to suffer pain in the future therefrom; that his aforesaid injuries have and will cripple him for life.

Plaintiff says that at the time of the occurrence of the matters complained of he was a healthy vigorous man, working and able to work, earning and able to earn the sum of approximately two hundred dollars ($200.00) a month at his occupation of a railroad switchman. That since his aforesaid injuries he has been unable to work and earn money, and will with reasonable certainty be wholly incapacitated in his ability to perform the work of a switchman or any other occupation and earn money in the future. That he will be forced to expend moneys for medical care and treatment of his injuries in the future, the exact amount of which
14 plaintiff is unable to state at this time.

Wherefore plaintiff, having been damaged in his body and person and in his earning capacity in the sum of seventy seven thousand six hundred dollars ($77,600.00), asks and prays judgment against the defendant, The Chesapeake and Ohio Railway Company, in the sum of seventy seven thousand six hundred ($77,600.00) dollars, and all other and proper relief in the premises.

TEETER AND HARTZLER
By C. L. TEETER,
Attorneys for the Plaintiff.

15 And afterwards, to wit: on the 11th day of February, 1931, the following further proceedings were had in the above entitled cause, to wit: Filed Feb. 1931.

* * (Caption) * *

Comes now the defendant herein, and files its plea in abatement denying the jurisdiction of the court, which plea in abatement reads in the words and figures following, to wit:

16 * * (Caption) * *

PLEA IN ABATEMENT DENYING THE JURISDICTION OF THE COURT.

First. The Chesapeake and Ohio Railway Company, the defendant in the above entitled cause, appearing specially and for the purpose of this answer only, by way of answer in abatement to Paragraph I of plaintiff's complaint herein, says:

That on November 29, 1930, and at the time of the alleged grievances complained of in said paragraph of complaint, the plaintiff was not employed by defendant in commerce between any of the several states or territories, or between any of the states or territories, or between the District of Columbia or any of the states or territories any foreign nation or nations, nor was he in any respect employed or engaged in inter-state commerce as therein alleged, and that by reason thereof this Court has no jurisdiction to hear and determine this action pursuant to the Act of Congress of the United States, approved April 22, 1908, and Amendments thereto, and which Act is commonly known as the Federal Employers' Liability Act.

It further says that at all times mentioned in said paragraph of complaint it was and now is as therein alleged a corporation duly organized and acting as such under and by virtue of the laws of the State of Virginia, and it fur-

17 ther says that during all said times it was and now is an inhabitant of the Eastern District of Virginia, and that in so far as the action declared upon in said paragraph is brought against the defendant or arises under or by virtue of the Act of the Congress of the United States known as

the Safety Appliance Acts and the Rules and Orders lawfully promulgated thereunder by the United States Interstate Commerce Commission, the same cannot be brought in any district court against this defendant by any original process or proceeding in any other district than said Eastern District of Virginia whereof it is an inhabitant as aforesaid.

Wherefore it says that this Court has no jurisdiction over this action or the person of this defendant and it prays that the same shall abate and be dismissed.

Second. The Chesapeake and Ohio Railway Company, the defendant in the above entitled cause, appearing specially and for the purpose of this answer only, by way of answer in abatement to Paragraph II of plaintiff's complaint herein, says:

That it admits that at all times mentioned in said paragraph of complaint it was and now is a corporation duly organized and acting as such under and by virtue of the laws of the state of Virginia, and that during such time it was and now is a citizen of the state of Virginia, but it denies that at the time of the commencement of this action the plaintiff was or now is a resident of the City of Fort Wayne, in Allen County in the State of Indiana, or of the Northern District of Indiana, or the Fort Wayne Division therein, or a citizen of the State of Indiana.

If further says that during all said times it was and now is an inhabitant of the Eastern District of Virginia, and that the action declared upon in said paragraph of complaint being brought against the defendant and arising under and by virtue of the Act of the Congress of the United States commonly known as the Safety Appliance Acts and, the Rules and Orders promulgated by the Interstate Commerce Commission of the United States, the same cannot be brought in any district court against this defendant by any original
18 process or proceeding in any other district than said Eastern District of Virginia whereof it is an inhabitant as aforesaid.

Wherefore it says that this Court has no jurisdiction over this action or the person of this defendant and it prays that the same shall abate and be dismissed.

(Signed) ALBERT H. COLE,
Attorney for Defendant.

State of Indiana } ss:
County of Miami }

ALBERT H. COLE, being duly sworn upon his oath, says that he is State Counsel for the Chesapeake and Ohio Railway Company, the defendant in the above entitled cause, and as such is authorized to and does make this affidavit on its behalf, and that the facts stated in each of the foregoing paragraphs of answer are true.

(Signed) ALBERT H. COLE.

Subscribed and sworn to before me, this 10th day of February, 1931.

(Signed) MILDRED BELL EASTER,
Notary Public.

My Commission expires: May 31, 1931.

19 And afterwards, to wit, on the 25th day of March, 1931, the following further proceedings were had in the above entitled cause, to wit: Filed Mar. 1931.

* * (Caption) * *

Comes now the defendant herein, and files its application for leave to amend the first paragraph of the plea in abatement denying the jurisdiction of the court, which application reads in the words and figures following, to wit:

* * (Caption) * *

APPLICATION OF THE DEFENDANT FOR LEAVE TO AMEND FIRST PARAGRAPH OF PLEA IN ABATEMENT DENYING THE JURISDICTION OF THE COURT.

The Chesapeake and Ohio Railway Company, the defendant in the above entitled cause, appearing, specially and for the purpose of this application only, hereby asks leave to amend the first paragraph of its plea or answer in abatement filed to paragraph I of plaintiff's complaint herein by inserting therein after the phrase "nor was he in any respect employed or engaged in Interstate Commerce as therein alleged", the following words: "nor was he assisting in switch-

ing freight cars from off the Shop Track easterly and over and onto the defendant's classifying tracks in the yard referred to in said paragraph of complaint for any of the
20 following purposes to wit: placing cars into trains so that said cars could continue any original movements in Interstate Commerce which were temporarily interrupted at said yard for the purpose of making "running" repairs to said cars; placing cars into trains for the purpose of moving said cars from Russell, Kentucky, to points in the State of West Virginia, Virginia and other states of the United States; placing cars in trains for the purpose of continuing the movements of said cars in Interstate Commerce from Ohio, Illinois, Indiana, and other states of the United States to their destination in the State of Kentucky; clearing the Shop Track Number 2 referred to in said paragraph of complaint of the cars therein referred to in order that plaintiff could assist his crew in the movement of other cars from Track Number 18 in said yard, referred to in said paragraph of complaint, to said Shop Track Number 2 immediately following upon the clearing of the cars off of the Shop Track as aforesaid, for the purpose of making of running repairs to said cars on said Number 18 track in order that said cars could continue any original movement in Interstate Commerce from Ohio, Indiana, Illinois, Virginia, West Virginia, Kentucky or other states of the United States to their destinations," and to verify said paragraph of answer as so amended.

ALBERT H. COLE
Attorney for Defendant.

And afterwards, to wit, on the 9th day of April, 1931, the following further proceedings were had in the above entitled cause, to wit:

21 * * (Caption) * *

Come now the parties herein, and now a hearing on the defendant's motion to amend the plea in abatement is had, and the court now grants leave to amend said plea in abatement. And now the defendant files its amended first paragraph of plea in abatement denying the jurisdiction of the court, which amended first paragraph of plea in abatement reads in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES

Filed Apr 1931.

For the Northern District of Indiana,

Fort Wayne Division.

James B. Moore, *Plaintiff,*
vs.
The Chesapeake and Ohio Railway Company, a corporation, *Defendant.*
} At Law—No. 402.

AMENDED FIRST PARAGRAPH OF PLEA IN ABATEMENT DENYING THE JURISDICTION OF THE COURT.

First: The Chesapeake and Ohio Railway Company, the defendant in the above entitled cause, appearing specially and for the purpose of this answer only, by way of amended answer in abatement to Paragraph I of plaintiff's complaint herein, says:

That on November 29, 1930, and at the time of the alleged grievances complained of in said paragraph of complaint, the plaintiff was not employed by defendant in commerce between any of the several states or territories, or between any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, nor was he in any respect employed or engaged in interstate commerce as therein alleged, nor was he assisting in switching freight cars from off the Shop Track easterly and over and onto the defendant's classifying tracks in the yards referred to in said paragraph of complaint for any of the following purposes to wit: pdacing cars into trains so that said cars could continue any original movements in Interstate Commerce which were temporarily interrupted at said yard for the purpose of making "running" repairs to said cars; placing cars into trains for the purpose of moving said cars from Russell, Kentucky, to points in the State of West Virginia, Virginia and other states of the United States; placing cars in trains for the purpose of continuing the movements of said cars in Interstate Com-

merce from Ohio, Illinois, Indiana and other states of the United States to their destination in the State of Kentucky; clearing the Shop Track Number 2 referred to in said paragraph of complaint of the cars therein referred to in order that plaintiff could assist his crew in the movement of other cars from Track Number 18 in said yard, referred to in said paragraph of complaint, to said Shop Track Number 2 immediately following upon the clearing of the cars off of the Shop Track as aforesaid, for the purpose of making of running repairs to said cars on said Number 18 track in order that said cars could continue any original movement in Interstate Commerce from Ohio, Indiana, Illinois, Virginia, West Virginia, Kentucky or other states of the United States to their destinations, and that by reason thereof this Court has no jurisdiction to hear and determine this action pursuant to the Act of Congress of the United States approved April 22, 1908, and Amendments thereto, and which Act is commonly known as the Federal Employers' Liability Act.

It further says that at all times mentioned in said paragraph of complaint it was and now is as therein alleged a corporation duly organized and acting as such under and by virtue of the laws of the State of Virginia, and it further says that during all said times it was and now is an inhabitant of the Eastern District of Virginia, and that in so far as the action declared upon in said paragraph is brought
23 against the defendant or arises under or by virtue of the Act of the Congress of the United States known as the Safety Appliance Acts and the Rules and Orders lawfully promulgated thereunder by the United States Interstate Commerce Commission, the same cannot be brought in any district court against this defendant by any original process or proceeding in any other district that said Eastern District of Virginia whereof it is an inhabitant as aforesaid.

Wherefore, it says that this court has no jurisdiction over this action or the person of this defendant and it prays that the same shall abate and be dismissed.

ALBERT H. COLE
Attorney for Defendant.

State of Indiana }
County of Miami } ss:

ALBERT H. COLE, being duly sworn upon his oath, says that he is State Counsel for The Chesapeake and Ohio Railway Company, the defendant in the above entitled cause,

and as such is authorized be and does make this affidavit on its behalf, and that the facts stated in the foregoing amended paragraph of answer are true.

ALBERT H. COLE

Subscribed and sworn to before me this 9th day of April, 1931.

MILDRED BELL EASTER
Notary Public.

My commission expires: May 31, 1931.

24 And afterwards, to wit, on the 10th day of April, 1932, the following further proceedings were had in the above entitled cause, to wit: Filed Apr. 1932.

* * (Caption) * *

Comes now the plaintiff herein, and files a demurrer to the defendant's plea in abatement to first paragraph of plaintiff's complaint, which demurrer reads as follows, to wit:

* * (Caption) * *

PLAINTIFF'S DEMURRER TO DEFENDANT'S PLEA IN ABATEMENT TO FIRST PARAGRAPH OF PLAINTIFF'S COMPLAINT.

The plaintiff, James B. Moore, demurs to the defendant's amended plea in abatement filed herein, denying the jurisdiction of the Court to hear and determine the cause of action stated in the first paragraph of plaintiff's complaint, upon the ground that said amended plea in abatement does not state facts sufficient to abate the cause of action so stated in said first paragraph of plaintiff's complaint.

TEETER & HARTZLER
Attorneys for Plaintiff.

MEMORANDUM.

The only jurisdictional fact involved and the only jurisdictional allegation contained in the plaintiff's first paragraph of complaint is "that at the time of the commencement of

the action stated in the plaintiff's first paragraph of
25 complaint, the defendant was doing business within the Northern District of Indiana." The defendant's plea in abatement does not deny this allegation or allege new matter showing any contrary facts but instead thereof does deny an allegation of substantive fact contained in said complaint.

The defendant's pleading therefore is in substance a plea to the merits of one of the material elements of plaintiff's cause of action and a plea in abatement in name only. It denies and challenges a material allegation of substantive fact made in paragraph one of plaintiff's complaint and does not deny or challenge any jurisdictional fact or allegation.

And now a hearing is had on the above demurrer, which demurrer to the amended first paragraph of plea in abatement is sustained by the court, to which ruling of the court the defendant at the time excepts.

Apr. 27, 1. And afterwards, to wit, on the 27th day of April, 1931, the following further proceedings were had in the above entitled cause, to wit:

* * (Caption) * *

Come now the parties herein, and now a hearing on the plea in abatement is had, which plea in abatement is overruled by the court, to which ruling of the court the defendant at the time excepts, and now the defendant files its answer in general denial, which answer reads in the words and figures following, to wit:

26 * * (Caption) * *

ANSWER IN DENIAL.

The Chesapeake and Ohio Railway Company, the defendant in the above entitled cause, for answer to plaintiff's complaint herein denies each and all of the material allegations therein alleged.

ALBERT H. COLE
Attorney for Defendant.

(Endorsed) * * (Caption) * * Filed Apr. 27-1931 Margaret Cowgill, Clerk. Answer in Denial. (Copy) Albert H. Cole, Peru, Indiana, Attorney for Defendant.

27 And now this cause being at issue, is submitted for trial to a jury composed of the following named persons: Arthur D. Rhamy, David Freed, Guy Pond, Verne Hill, A. C. Bailey, Wayne Brunson, Wilbur C. Hoppes, Fred H. Fehling, James Fidler, F. H. Harlan, J. W. Harvey and Geo. L. Jordan, and now the evidence herein is begun and continued.

And afterwards, to wit: on the 28th day of April, 1931, the following further proceedings were had in the above entitled cause, to wit:

* * (Caption) * *

Come now the parties herein, and now the evidence herein is resumed and continued, and now the plaintiff rests, and the defendant's evidence is begun.

And afterwards, to wit: on the 29th day of April, 1931, the following further proceedings were had in the above entitled cause, to wit:

* * (Caption) * *

Come now the parties herein, and now the defendant's evidence is continued and concluded, and now the defendant rests. And now the defendant files a motion for a directed verdict in favor of the defendant, which motion reads in the words and figures following, to wit:

* * (Caption) * *

Filed Apr. 1931.

28 MOTION TO DIRECT VERDICT.

The defendant at the close of all of the evidence hereby moves the court to direct the jury to return a verdict in favor of the defendant for each of the following reasons:

(1) The evidence is insufficient to establish the fact that the plaintiff was employed by the defendant in Interstate Commerce at the time of receiving the injury complained of.

(2) The evidence is insufficient to establish that the defendant violated the Act of Congress commonly known as the Safety Appliance Acts or any rules or orders lawfully

promulgated thereunder by the United States Interstate Commerce Commission in any of the particulars charged in the complaint.

(3) The evidence is insufficient to establish the fact that any violation on the part of the defendant of any provision of the Act of Congress commonly known as the Safety Appliance Acts or any rules or orders lawfully promulgated thereunder by the United States Interstate Commerce Commission and declared upon in this action was the proximate cause of plaintiff's alleged injuries.

(4) The evidence is insufficient to show that the defendant was guilty of any act of negligence which was the proximate cause of plaintiff's alleged injuries.

(5) It affirmatively appear from the evidence that the plaintiff assumed the risk of injury from the negligence of the defendant, which is complained of.

(6) The court is without jurisdiction over the cause of action declared upon in the second paragraph of complaint for the reason that the same is a civil suit at law arising under a law of the United States known as the Safety Ap-
29 pliance Act and brought by original process or proceeding in a district other than that whereof the defendant is an inhabitant and the jurisdiction is not founded only on the fact that the action is alleged to be between citizens of different states.

ALBERT H. COLE
Attorney for Defendant.

which motion is overruled by the court to which ruling of the court the defendant at the time excepts. And now the arguments are heard by the court, and now the jury is instructed and retires for deliberation.

ed Apr. 30, 1. And afterwards, to wit, on the 30th day of April, 1931, the following further proceedings were had in the above entitled cause, to wit:

* * (Caption) * *

Come now the parties herein, and come also the jury into open court and returns its verdict as follows:

"We, the Jury find for the plaintiff and assess his damages at $30,000.00.

ARTHUR D. RHAMEY, *Foreman.*"

And afterwards, to wit, on the 11th day of May, 1931, the following further proceedings were had in the above entitled cause, to wit: Filed May 1931.

* * (Caption) * *

30 Comes now the defendant herein, and files its application for leave to file a motion for a new trial and request for oral argument thereon, which application reads in the words and figures following, to wit:

* * (Caption) * *

APPLICATION FOR LEAVE TO FILE MOTION FOR NEW TRIAL AND REQUEST FOR ORAL ARGUMENT THEREON.

The Chesapeake and Ohio Railway Company, the defendant in the above entitled cause, hereby asks leave to file herein a motion for a new trial of the above entitled cause and requests an oral argument on such motion.

ALBERT H. COLE,
Attorney for defendant.

which leave is now granted by the court, and the defendant now files a motion and application for new trial, which motion and application for new trial reads in the words and figures following, to wit: Entered 1931.

* * (Caption) * *

Comes now The Chesapeake and Ohio Railway Company, the defendant in the above entitled cause, and moves and applies to this court for an order setting aside the verdict herein and granting a new trial of the above entitled cause for each of the following reasons:

31 (1) The verdict is not sustained by sufficient evidence.

(2) The verdict is contrary to law.

(3) The damages assessed by the jury are excessive.

(4) The court erred in permitting the plaintiff, James B. Moore, when testifying on his own behalf on his examination in chief, on direct examination on the hearing of the second paragraph of defendant's plea in abatement to the jurisdic-

tion of the court, to answer, over the objection of the plaintiff, the following question "When, for the first time, did you make up your mind to leave for Ft. Wayne?" To which question the witness answered: "Jannary 9, 1931." To which ruling of the court the defendant at the time excepted.

(5) The court erred in finding against the defendant on the second paragraph of its plea in abatement to the jurisdiction of the court which was addressed to the second paragraph of plaintiff's complaint, to which ruling of the court the defendant at the time excepted.

(6) The court erred in permitting the plaintiff, James B. Moore, while testifying on his own behalf, in chief on direct examination on the trial of said cause on its merits, to answer, over the objection of the defendant, the following question: "Now tell the jury what you observed on this car with reference to where this car came from, where it was going and what was done with it." To which question the witness made the following answer: "BF four form card and said on the card from Parson's Yard, C. F. Ehrman to Raceland Shops, broken center sill to C. B. Ratcliff." To which ruling of the court the defendant at the time excepted.

(7) The court erred in permitting the plaintiff, James B. Moore, while testifying on his own behalf, in chief on direct examination on the trial of said cause on the merits, to answer, over the objection of the defendant, the following question: "How much lower than the bottom of the axle did the lever of the handle descend?" To which question said witness made the following answer: "Two inches or more."
32 To which ruling of the court the defendant at the time excepted.

(8) The court erred in permitting the witness Roland R. Schulz, while testifying on behalf of the plaintiff, in chief on direct examination, to answer, over the objection of the defendant, the following question, "I will ask you to state to the jury what the law of Kentucky was in that respect in full force and effect on November 29, 1930, in the State of Kentucky?" To which question said witness made the following answer: "This was the law: That every common carrier by railroad while engaged in commerce in this State shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, to his or her personal representative for such injury or death to such employee resulting in whole or in part from the negligence of any of the

officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, docks, boats, wharves or other equipment. In all actions hereafter brought against such common carrier by railroad, or by virtue of any of the provisions of this Act to recover damages for personal injury to any employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; provided, that no such employee who may have been injured or killed shall be held to have been guilty of contributory negligence in any case where the violation of such common carrier of any statute, State or Federal, enacted for the safety of employees contributed to the injury or death of such employee. That in any action brought against any common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for injuries, to, or the death of, any employee, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute,
33 State or Federal, enacted for the safety of employee, contributed to the injury or death of such employee," and in overruling defendant's motion to strike out said answer, to each of which rulings of the court, the defendant at the time excepted.

(9) The court erred in refusing to permit the witness John Robbins, while testifying as a witness for plaintiff, on cross-examination on plaintiff's case in chief, to answer the following question: "What was the practice at Russell with reference to cars which came there to be repaired at the shops from other divisions, as to whether these cars were frequently held on different repair tracks for a considerable period of time before finally reaching the shops?" To which ruling of the court the defendant at the time excepted.

(10) The court erred in refusing to permit the witness John Robbins, while testifying as a witness for plaintiff on cross-examination on plaintiff's case in chief, to answer the following question: "What is the fact as to whether cars which came from Parson's Yard under the direction of Mr. Ehrman, with the cards tacked on in the same form as Plaintiff's Exhibit 1, being form BF four, after arrival at the Russell Yards were from time to time sent out on the road

to be loaded without ever going to the Russell Shops?" To which ruling of the court the defendant at the time excepted.

(11) The court erred in permitting the witness E. Berkhardt, while testifying as a witness for the defendant, to answer upon cross-examination, over the objection of the defendant, the following question: "And Mr. Moore said to you, the low lift lever was bent, went too low and unbalanced me?" To which question the witness answered: "He said a low lift lever." To which ruling of the court the defendant at the time excepted.

(12) The court erred in refusing to permit the witness John Robbins, while testifying on his direct examination as a witness on behalf of the defendant, to answer the following question: "What is the fact as to whether or not cars with those cards were from time to time inspected by men from the shops and sent out to road service without first 34 going to the shops?" To which ruling of the court the defendant at the time excepted.

(13) The court erred in refusing to permit the witness L. S. Ward, while testifying on behalf of defendant on direct examination, to answer the following question: "Did that bend have anything to do with making the handle of the lever higher or lower from the top of the rail?" To which ruling of the court the defendant at the time excepted.

(14) The court erred in refusing to give to the jury instruction numbered 1 of the instructions tendered by the defendant, to the refusal of which the defendant at the time, in the presence and prior to the retirement of the jury excepted.

(15) The court erred in refusing to give to the jury instruction numbered 2 of the instructions tendered by the defendant, to the refusal of which the defendant at the time, in the presence and prior to the retirement of the jury excepted.

(16) The court erred in refusing to give to the jury instruction numbered 3 of the instructions tendered by the defendant, to the refusal of which the defendant at the time, in the presence and prior to the retirement of the jury excepted.

(17) The court erred in refusing to give to the jury instruction numbered 4 of the instructions tendered by the defendant, to the refusal of which the defendant at the time, in the presence and prior to the retirement of the jury excepted.

(18) The court erred in refusing to give to the jury in-

struction numbered 5 of the instructions tendered by the defendant, to the refusal of which the defendant at the time, in the presence and prior to the retirement of the jury excepted.

(19) The court erred in refusing to give to the jury instruction numbered 6 of the instructions tendered by the defendant, to the refusal of which the defendant at the time, in the presence and prior to the retirement of the jury excepted.

(20) The court erred in instructing the jury to the following effect: He (the plaintiff) also charges that the defendant used the same push-down type of uncoupling lever and handle of lever which when operated in the usual, normal and ordinary way dropped fifteen inches over all * * * The Interstate Commerce Commission has provided certain rules and regulations and has provided the distance above the rail that interstate carriers shall be permitted to use couplers and uncouplers. The rule of the Interstate Commerce Commission provides that handles of uncoupling levers shall have a minimum drop of twelve inches, a maximum of fifteen inches over all * * * The serious question in this case for you to consider is the question of whether or not the defendant violated the Safety Appliance Act, the uncoupling act, in that it did not have an uncoupling lever that complied with the Safety Appliance Act and the rules of the Interstate Commerce Commission with reference to the height above the rail and the maximum movement of the handle of the uncoupling device. If you find the defendant did violate that rule or a provision of the Safety Appliance Act and the plaintiff's injury was the proximate result of such violation, then the plaintiff is entitled to recover in this case. The defendant having at the time, in the presence and before the retirement of the jury, excepted to said portion of said charge, wherein the jury were told that they were entitled to award a recovery if the lever in question dropped more than fifteen inches over all.

Wherefore, defendant prays that the verdict be set aside and that a new trial be granted.

Dated this 9th day of May, 1931.

ALBERT H. COLE,
Attorney for defendant.

I hereby allow the within motion and application to be filed in this cause. Entered 1931.

Dated this 11 day of May, 1931.

THOMAS W. SLICK,
District Judge.

d Jan. 16, 36 And afterwards, to wit, on the 16th day of January, 1932, the following further proceedings were had in the above entitled cause, to wit:

* * (Caption) * *

Come now the parties herein, and now the defendant's motion for a new trial is overruled by the court, to which ruling of the court the defendant at the time excepts, and now the plaintiff moves for judgment on the verdict, which motion is sustained by the court and judgment is entered on the verdict heretofore returned into open court.

It is therefore considered and adjudged by the court that the plaintiff have, recover of and from the defendant herein, as damages, on the complaint sued upon, the sum of Thirty Thousand ($30,000.00) dollars, together with the costs of this action, laid out and expended, taxed at $.....

To which ruling of the court in entering judgment on the above verdict, the defendant at the time excepts.

And afterwards, to wit, on the 4th day of March, 1932, the following further proceedings were had in the above entitled cause, to wit:

* * (Caption) * *

Comes now the defendant herein, and files its Bill of Exceptions, containing all the evidence, which is approved, allowed, settled and ordered made a part of the record, which is accordingly now done, and reads in the words and figures following, to wit:

37 * * (Caption) * *

tions Mar. 4,

BILL OF EXCEPTIONS.

Be It Remembered, That on the 27th day of April, 1931, at the April Term of the District Court of the United States for the Northern District of Indiana, Fort Wayne Division, the above entitled cause came on for trial before the Honorable Thomas W. Slick, Judge of said court; that by agreement of the parties T. H. Paulmann, a Notary Public in and

for the County of Allen, State of Indiana, acted as such reporter, and as such took down in shorthand a full, true and complete verbatim report of all the evidence given and offered by the parties in said cause, and all objections thereto and the rulings of the court thereon and all exceptions thereto, which said shorthand report was transcribed by said reporter and has been preserved; that the plaintiff was present in person and represented by Teeter & Hartzler and Edward Davidson, his attorneys, and that the defendant was represented by Albert H. Cole, his attorney.

38 The defendant, to maintain the issues, joined under its Plea in Abatement, offered and introduced the testimony of the witnesses and the documentary evidence hereinafter mentioned, which testimony, by deposition or otherwise, and on direct, cross and redirect examination, together with such documentary evidence in condensed and narrative form, is as follows:

DEFENDANT'S EVIDENCE.

Deft's. Ex

DEFENDANT'S EXHIBIT 1.

MINTA A. MOORE—Deposition:

Direct Examination.

I am the wife of the plaintiff and was married to him in Carter County, Kentucky, in 1910. I have lived at 3102 Gallia Street, Portsmouth, Ohio, for five years, in property owned by James B. Moore, with eight children, aged from three to twenty years. Mr. Moore worked for the Norfolk & Western for about six years prior to 1920, then a short time in an ice plant at Portsmouth, Ohio, a month in the mines in West Virginia, and since then for the C. & O. Railway Company at Russell, Kentucky. I have lived in Scioto County, Ohio, ever since 1912. While working for the Norfolk & Western, the ice plant and in the mines, plaintiff lived at Portsmouth, Ohio, being at the mines for only about a month. While working for the C. & O. he came home at first every day, then about every other day, during the last two years every other week. He paid the household expenses, with my help from keeping roomers. After his injury he was taken to the C. & O. hospital at Huntington, West Virginia, came home the

week after he left the hospital, stayed one night, and when he next returned he said that he had been to Fort Wayne to see a specialist, and thereafter he went to the Huntington hospital for about a week, coming back home every two days, and making one trip to Fort Wayne. He was last at home on January 10, 1931. Our children attended the public schools in Portsmouth. He had no friends, acquaintances or rel-
39 atives in Fort Wayne and owned no home or real estate other than where I live at Portsmouth.

Cross-Examination.

We had trouble about a woman at Ironton. He told me on January 3 that he wouldn't live with me another day. I have a suit for alimony or support for the children pending to keep him from wasting his money on this woman. He has not lived with me and the children since January 10, 1931.

Redirect Examination.

I found out about the other woman in August, 1930, after which Moore returned to his home only every two weeks. Difficulty with this woman led to him striking me. I filed a charge against him for non-support, upon which a warrant was issued for his arrest. After about two weeks he would return to his home at Portsmouth on pay days, remaining about an hour and leaving most of his check to pay debts. He last ate at home after Christmas.

Ex. 2-A. DEFENDANT'S EXHIBIT 2-A.

LEE MOORE—Deposition:

Direct Examination.

I reside at Raceland, Kentucky, and have known Moore for sixteen years. He lived at Portsmouth, first on Walnut and later on Gallia Street where his family now live. In October, 1920, Moore began working at Raceland, but continued to live at Portsmouth. He boarded and roomed with me at Raceland for ten years, and said that he went back to see his family every two weeks. He claimed Portsmouth as his home, and owned three properties there. He took out a 1931 Ohio

license on his automobile. He had no friends or relatives in Fort Wayne. He left my home three months before the accident and went to Mrs. Ida Lewis' at Raceland, Kentucky.

40 DEFENDANT'S EXHIBIT 2-B. Deft's. Ex.

MRS. IDA LEWIS—Deposition:

Direct Examination.

I reside at Raceland, Greenup County, Kentucky, near the Russell Yards of The C. & O. Railway Company, and have known James B. Moore all our lives. His family lived at Portsmouth. He boarded at my house for about three months, beginning in September, 1930. He wasn't there after he was hurt except to come and go. While boarding with me he went home to his family every two weeks. He never brought any furniture to Raceland, but had his trunk, clothes and tools. Part of his tools are still there. He spoke of owning property in Portsmouth, but I never heard him speak about going to Fort Wayne.

DEFENDANT'S EXHIBIT 3, a photostatic and certified copy of the application of the plaintiff for an Ohio automobile license for the year 1931, dated December 26, 1930, and stating his residence to be 3102 Gallia Street, Portsmouth, Ohio, was admitted and read in evidence.

DEFENDANT'S EXHIBIT 4, being a certified copy of certain proceedings in the Common Pleas Court of Scioto County, Ohio, was then introduced in evidence, the substance and purport thereof being as follows:

There was filed on January 8, 1931 in the Court of Common Pleas, Scioto County, Ohio in cause number 23948 entitled Minta A. Moore, 3120 Galia Ave., Portsmouth, Ohio, Plaintiff, vs. James B. Moore, 3120 Galia Ave., Portsmouth, Ohio; Brotherhood of Railroad Trainmen, Cleveland, Ohio and Chesapeake and Ohio Railway Company, Richmond, Virginia, Defendants, by said plaintiff therein a verified petition alleging that plaintiff was married to the defendant Moore on October 10, 1910; that seven (7) children, whose names and ages were therein set out were born to said marriage; that the said James B. Moore had been guilty of improper conduct and was failing to properly care for his fam-

ily; he had a claim for accident insurance against the
41 defendant Brotherhood of Railroad Trainmen and a claim for injury against the defendant The Chesapeake and Ohio Railway Company, which he would collect and squander; plaintiff was without means for the support of herself and children and praying that the two defendants last named be enjoined from paying any money to the defendant Moore and that the plaintiff be allowed temporary alimony for the support of herself and children and permanent alimony and other and further relief upon the final hearing.

A temporary injunction was allowed as prayed for on said day and summons issued and served on the defendant's Brotherhood of Railroad Trainmen and Chesapeake and Ohio Railway Company by delivering copies thereof to their respective Secretary.

That on March 17, 1931 there was filed in said court a return of the Sheriff of Scioto County by his deputy, showing that summons was served on the defendant James B. Moore by delivering to him personally a true and certified copy thereof on January 12, 1931; on February 6, 1931 the defendant James B. Moore appearing solely for the purpose of the motion herein referred to filed a motion to set aside the return last referred to for the reason that said summons was not served upon him by delivering to him personally a true and certified copy thereof as stated in said return and for the reason that he had not otherwise been served with summons in said cause, together with his affidavit that he was not in the City of Portsmouth, County of Scioto, Ohio, or in the State of Ohio, on the 12th day of January, 1931, and was not personally served with summons in said cause on said day or any other day.

On February 10, 1931 The Chesapeake and Ohio Railway Company filed in said cause its separate answer alleging that it was not indebted to the defendant James B. Moore and had no funds in its hands belonging to him; on March
17, 1931 said cause was heard on said motion of the de-
42 fendant James B. Moore and was submitted to the court upon the pleadings and the evidence and the court being fully advised in the premises found that the Sheriff did not make personal service as returned by him, but that he did serve said defendant by leaving a certified copy of said summons at Number 3102 Galia Ave., Portsmouth, Ohio, said number being the number set out in the petition of the plaintiff as the residence of said defendant.

It was thereupon ordered, adjudged and decreed that said motion be, and the same was, overruled and the Sheriff was ordered and directed to file an amended return forthwith showing the actual facts of said service and showing that the same was left at Number 3102 Galia Street, the reputed residence of the defendant, to which ruling the defendant Moore excepted and an amended return was filed by the Sheriff on March 17, 1931 showing that summons was served upon James B. Moore by leaving at his usual place of residence a true and duly certified copy thereof on January 12, 1931.

43 There was then introduced in evidence DEFENDANT'S EXHIBIT 5, being a certificate of the Clerk of the Corporation Commission of the State of Virginia, of the following tenor:

Commonwealth of Virginia

Department of the State Corporation Commission.

I, N. W. Atkinson, Clerk of the State Corporation Commission, do hereby certify, that The Chesapeake and Ohio Railway Company is a corporation organized and existing under the laws of the Commonwealth of Virginia, and empowered and authorized as of this date to exercise its corporate functions.

In Testimony Whereof, I hereunto set my hand, and affix the Official Seal of the State Corporation Commission, at Richmond, this 18th day of April, 1931.

N. W. ATKINSON

(Seal) *Clerk of the Commission.*

44 The defendant thereupon rested.

The plaintiff, to maintain the issues on his behalf joined under the plea in abatement, introduced the testimony of the witnesses and the documentary evidence hereinafter mentioned which testimony on direct, cross and re-direct examination, together with such documentary evidence in condensed and narrative form is as follows:

PLAINTIFF'S EVIDENCE.

It was shown by the record that this cause was filed in the District Court of the United States for the Northern District of Indiana, Fort Wayne Division, on January 15, 1931.

FLORA K. O'BRIAN:

Direct Examination.

I live with my husband at 825 West Berry Street, Fort Wayne, Indiana. I met James B. Moore on January 12, 1931. He was looking for a room. He came back on January 13 and paid $10.00 for a week's room, board, and garage space for car and tools. He moved into my home on January 13th, bringing with him on that day his suitcase. His trunk was sent to my home by express within a day or so. He had his car with him when he came to my home January 13th but not tools. The tools he brought later. He has been absent since January 13th from Ft. Wayne to my knowledge two or three times for a day or so at a time. He would leave by automobile. He would not have any tools with him when he would leave Fort Wayne but would come back with tools. He did that two times. He stored his tools in the garage. He has kept his trunk, automobile and tools at my home ever since they arrived. He has lived continuously at my home since January 13, 1931. He rented a room by the week. He wanted to rent by the month. His car had an Ohio license and he asked how long he could use it in Indiana, and later changed to an Indiana license which he has since maintained. He and my husband have gone to the adjacent country looking up land values, his purpose being to find a truck garden. He has expressed no intention of leaving Fort Wayne, but has kept at my home everything he brought there.

Cross-Examination.

His trunk came by express within a week after he first came. He first brought tools two or three weeks afterwards, and in another week or so he brought more tools. He was away two or three times for a day or so and went with his car every time.

46 JAMES B. MOORE:

Direct Examination.

I live at 825 West Berry Street, Fort Wayne, Indiana, and took up my residence there on January 13, 1931, with Mr. O'Brian, paying $10.00 a week for room, board and garage for my car and tools. I took my car there on that day. The trunk was delivered a few days afterwards, and I have lived, taken my meals and kept my car there continuously since January 13, 1931. Prior to this I had been rooming at Raceland, Kentucky, at Samme Lewis' for a few months while working for The Chesapeake and Ohio Railway Company at Russell, Kentucky. My family lived at 3102 Gallia Street, Portsmouth, Ohio, thirty miles from Raceland. I left Raceland on January 10, 1931, prior to which I had seen my wife and children about once a week. I made about $200.00 a month, giving my family all but my expenses. Leaving Raceland, I brought all my belongings to Fort Wayne, Indiana, except some heavy tools which I arranged to have sold. I have no other property at Russell, Kentucky, or Portsmouth, Ohio. I made up my mind to leave for Fort Wayne on January 9, 1931, when I saw in the Portsmouth paper that my wife had sued me. The next morning I asked her if it was true and she said yes. I got my clothes at Raceland, said goodbye on the 11th, and came to Fort Wayne. I have not gone back to where my wife and family live since January 11, 1931, and told my family on that day that I was going to make my home elsewhere. I made several trips out in the country seven or eight miles to look over land and inquired as to its value with a view to purchasing a small farm at Fort Wayne. I changed the license on my car to an Indiana license for 1931, and have not since used the Ohio license.

Cross-Examination.

I think I got the Indiana license on February 24, but have never had an Indiana driver's license. Nothing was said to me about getting one. I was first in Fort Wayne on De-
47 cember 22, 1930, and left on December 23. I knew nobody in Fort Wayne except Teeter and Hartzler. I came on the 22nd with Mr. Davidson and drove through. I

was through Indiana six or seven years ago to Chicago and back. I have never voted in Indiana nor in Ohio since January, 1931, there being no election there that I know of. I was at my house since January 3, 1931, and since January 11 or 12th have been to Raceland, Kentucky, two or three times.

Redirect Examination.

I applied for my Indiana automobile license on February 24, 1931, while living at 825 West Berry Street, Fort Wayne, Indiana.

PLAINTIFF'S EXHIBIT 4, being the automobile license issued to the plaintiff under date of February 24, 1931, and showing his residence as 825 W. Berry St., Ft. Wayne, Ind., was read in evidence.

I came to Fort Wayne on December 22, 1930, for the purpose of bringing suit against The Chesapeake and Ohio Railway, and suit was filed in this court on January 10, 1931, predicated on the fact that I was engaged in interstate commerce at the time I was injured. I then saw Dr. Elston, who treated me, and I have since been under his care. It is my intention to remain living in Fort Wayne, Indiana, permanently.

JOHN LOCHMONDAY:

Direct Examination.

I am chief deputy clerk of the United States District Court, Northern District of Indiana, and identify Bar Docket No. 3.

JAMES B. MOORE recalled:

Direct Examination.

I came to Fort Wayne on December 22, 1930, to file the suit filed on January 10.

Plaintiff thereupon rested.

48 The court then made the following ruling: The court now finds that the plaintiff is a citizen of the State of

Indiana and a resident of the City of Fort Wayne, Allen County, Indiana, and finds against the defendant on its second paragraph of its plea in abatement which is addressed to the second paragraph of the complaint.

To which ruling of the court the defendant at the time excepted.

And be it further remembered that after the court had found against the defendant on its plea in abatement the defendant filed to the complaint its answer in denial and thereupon and on said 27th day of April, 1931, said cause came on for trial on the issues joined by the complaint and said answer, and a jury, having been empaneled and sworn, the plaintiff to maintain the issues so joined, offered and introduced the testimony of the witnesses and the documentary evidence and the parties made the stipulations hereinafter mentioned, which testimony, by deposition or from such witnesses in person, on direct, cross and redirect examination, together with such documentary evidence and stipulations all in condensed and narrative form, is as follows:

PLAINTIFF'S EVIDENCE.

Pltf's. Ex.

It was stipulated that the defendant is a Virginia corporation and at the time the plaintiff sustained his injuries was an interstate railroad operating through Illinois, Indiana, Ohio, Kentucky, West Virginia and Virginia as a common carrier by steam railroad and that at the time this action was commenced it was doing business within the territorial jurisdiction of the District Court of the United States for the Northern District of Indiana, Fort Wayne Division.

49 J. G. RAYBURN. Testimony by deposition, introduced as plaintiff's Exhibit 5:

Direct Examination.

I have been assistant general car foreman at Columbus, Ohio of The Chesapeake and Ohio Railway Company, a steam railroad corporation, engaged in hauling freight and passengers from state to state, for twenty-one years. I supervise car department employees and repairs to cars. Cars are inspected by the transportation department and the principal

defect of bad order cars marked on a bad order card. They are then placed on the repair track and again inspected by the gang foreman of the car department and in case of doubt the attention of myself or C. E. Ehrman, supervisor, is called to it. Ehrman works at Parsons yard, Columbus, Ohio. The company has no paint shop at Columbus, that work being done at the Russell car shops. I never heard of a Raceland car shop. The post office where they are located is Raceland. Ratcliffe is foreman of the Russell car shop. Raceland is approximately three miles from Russell, Kentucky. Plaintiff's Exhibit 1 is a blank card applied to a car sent to the Russell Car Shop from Parsons Yard for real heavy repairs or a new paint job. The form is made out by Gang Foreman Hughtmacker or Clime or on information furnished by them. It indicates that it is coming from Parsons Yard to Russell Car Shop for repairs. We dont fill in the date and where it says "consigned to" we ordinarily fill in the name of C. V. Ratcliff. We do not fill in the blank "forwarded by" and following the words "order of" C. V. Ehrman is filled in with a stamp, typewriter or hand writing. The card is then tacked on the cardboard on each side of the car. I do not know what is done with it afterwards. I have no record of cars C&O 20031 and 54069 being on our repair track.

50 Plaintiff's Exhibit 2 is Form 265 used by inspectors. Car C&O 33555 was on our shop track November 24, 1930, inspected for Safety Appliance defect and none found. It was sent to the Russell Car Shop for repairs that in our opinion were necessary for a draft sill defect. We applied form BF 4. Plaintiff's Exhibit 3 is a card used by the car department at Parsons with reference to car C&O 33555 empty on November 24, 1930. C. V. Ratcliff appears on it in handwriting, also draft sill broken and indicates that the car should be billed to Ratcliff at Russell Car Shop for that defect. We bill those cars to those people and then they use their judgment. I don't know what they do with it. When the C. & O. took over the Hocking Valley we used the forms that the Hocking Valley had. Car 33555 was consigned by our department at Parsons terminal, Columbus, Ohio, for the work designated therein to be done at the Russell Car Shop and was consigned to C. V. Ratcliff, its superintendent. The card is a record kept in the usual course of business. This car was on our repair track on November 25, 1930 and we made out another card or record concerning it, the words "not shop" indicating that no Safety Appliance defect ex-

isted at that time. Form L-265 shows C&O 33555 and all other cars found on the track and shows center sill cracked. This (indicating) is "bad floor shop" and means that the car is supposed to come to our repair track at Parsons. We sent it to the Russell Car Shop because of difference of opinion relative to the class of work to be done. C&O 33555 was a flat bottom steel car. Plaintiff's Exhibit 4 is Form L-265 with reference to car HV 21342 and shopped by our inspector on account of broken center sills on November 26, 1930. That was a heavy repair. Plaintiff's Exhibit 5 is similar to plaintiff's Exhibit 3, referring to HV 21342, C. V. Ratcliff's name on the card indicates that the car was to be billed to Russell Car Shop for the repair of center sill.

Form BV 4 is one shop card. We have another called
51 the bad order car. BF 4 is the only form used on the cars going to the Russell Car Shops. Sometimes Erhman signed his name to the form BF 4 but most of the time it is put on by myself or the Gang Foreman. I have no record of cars C&O 3467, Virginia 11838, NKP 31549, C&O 58038, Wabash 8505, C&O 64481, and C&O 44035.

There were then admitted in evidence:

PLAINTIFF'S EXHIBIT 8, being Plaintiff's Exhibit 3 in the deposition last referred to, bearing the initials and car number C&O 33555 dated November 24, 1930 and in a column headed "Repairs Made" the words "C. V. Ratcliff, Df. sill Br."

PLAINTIFF'S EXHIBIT 7, being Exhibit Number 2 in the deposition last referred to and setting forth the following information: The Chesapeake and Ohio Railway Company—Record of Cars Shopped for Repairs, Place new yd, Date 11-23-30, Initial and Numbers C&O 33555, Defects center sill.

EXHIBIT NUMBER 9, being Exhibit Number 4 in the deposition last referred to and setting forth the following information: Place ..... Road, Date 11-26, 1930, Initial Number HV 21342, Defects billed for shop center sill bro BR" together with the signature of the inspector.

EXHIBIT NUMBER 10, being Exhibit Number 5 in the deposition last referred to and designating car HV 21342 empty dated November 26, 1930 and in the column headed "Repairs Made" B "1 center sill bro C. V. Ratcliff."

Ex. 11. C. F. ERHMAN. Deposition introduced as Plaintiff's Exhibit Number 11:

Direct Examination.

I am General Car Foreman of The Chesapeake and Ohio Railway Company, a steam railroad extending into Virginia, West Virginia, Kentucky, Ohio, Indiana and Illinois. I have charge of the Columbus terminal. Cars that come in trains through Columbus to Parsons Yard are inspected by mechanical men in the Transportation Department and if
52 found to require repairs, have a form made out and tacked on them indicating the principal defect and are taken out of the train and placed on the shop repair track in the Parsons Yard. The heavy repair work is not done at Parsons Yard but at the big shop at Raceland, Kentucky. We send the cars to the Russell Car Shops. We don't specify Raceland, Kentucky, we say Russell Car Shops. It is not in Russell and I didn't see any other town. It is six or eight miles out of Russell. The terminal office is at Russell and trains from Columbus first stop at the terminal at Russell. C. V. Ratcliff is the shop superintendent of the Russell Car Shops where we send these cars that require work to be done. I am in charge of the Car Repair Department at Columbus. The company has no paint shop at Columbus, the painting and heavy repairs being done at the Russell Car Shop. When a car is sent to the Russell Repair Shop for heavy repairs we make out a card similar to Plaintiff's Exhibit 1 form BF 4 indicating the initials and car number and showing it consigned to Russell Car Shop and sometimes C. V. Ratcliff. We don't put the defect on it. It then leaves our track and we presume is forwarded to the Russell Car Shop for that work. According to plaintiff's Exhibit Number 3, C&O car 33555 was consigned to C. V. Ratcliff at the Russell Car Shops for heavy repairs and the same is true with car HV 21342. My name is put on the card with a rubber stamp and this is done by my authority. This is the way the work was done on and prior to November 29, 1930.

Court adjourned to April 28th.

JOHN A. ROBBINS' deposition. Introduced as Plaintiff's Exhibit 12: Pltf's. Ex.

Direct Examination.

I am Car Foreman of the light side shop repair yard of the C. & O. Railway at Russell, Kentucky, which is a division point on the railroad. This is a yard for light or running repairs, the heavy or dismantling repairs being done at the Raceland Car Shop west of the C. & O. yards. After we go to work at seven o'clock in the morning if there are any
53 cars on Track 2 the Clerk checks the cars on the switch list. They are ordinarily placed there at night or in the morning. Repairs are made during the day. I direct the work. Exhibit Number 1 is a switch list on Number 2 Shop Track east bound yard dated November 29, 1930, the time 9:35 indicating the time the cars were set on the track. No heavy repairs were made. Those repairs were made at the shops. The pencil writing HV 14908 new shop paint order means a Hocking Valley car was sent to the new shops for painting. It is west of the Transportation Shop in Russell, Kentucky. Where no other carriers letter appears the number of the car is a C. & O. car. No record is kept of when these cars are moved off the track or of the work done by a particular engine. I understand that Moore's accident happened on the lead, a track which leads to the east bound yard. They are pulled from the Transportation Yard down the lead to the west end of the repair track. Number 2 runs east and west and you have to pull the cars from the west end of the repair track and shove them up to the lead. Plaintiff's Exhibit Number 1 is a complete record of all cars on Track Number 2 that day. On car 58533 on November 29, 1930 knuckle pin was applied to BN and air brakes were cleaned and tested, being light running repairs taking about 1½ hours. This car was switched from the train into the transportation yard. I don't know where it came from. If they are shop cars with light repairs they remain on the track and if heavy repairs they are sent to the shops. Where the repairs are light and running repairs and the cars are not taken out of service repairs are made on shop track 2 and the car permitted to carry on its trip. The work on 58533 was done on Number 2 Shop Track. It was withdrawn from service about 1½ hours until the repairs and inspection were made and shoved back to the train for the continuance of its trip. If it

had required heavy repairs it would have been sent to the shop. On HV 14908 knuckle pin was applied on the A
54 end and the air brakes tested on Number 2 Repair Track. I sent it to the new shop but have no knowledge or record of any further work. The work on Track 2 was a running repair, taking thirty minutes. All the cars on that train at any one time would have whatever work that was called for done before any one of the cars would be moved and upon the completion of all cars they would all be moved at one time. This was the way the work was performed on November 29. On C&O 112161 knuckle pin was applied to A end taking five minutes. This was a running repair. C&O 20439 received no repairs but was inspected and sent to the new shop on account of a loose sill. It would have to be withdrawn from service which I ordered done and this would be a heavy repair. I don't know whether the repair was made. On C&O 110140 raising bolts were applied or a light repair, requiring one hour. It was sent to the new shop for painting. No repairs were made to C&O 22371 which was sent to the new shop for sills. It would be withdrawn from service. HV 13062 had knuckle pin applied to the A end, taking ten minutes, a running repair after which it was sent to the new shop. On C&O 70311 knuckle pin was applied to B end, taking about five minutes, a running repair after which it was ready for active service. C&O 33782 had coupler removed from A end yoke-rivits applied and knuckle pin applied on B end, taking 2½ hours,—running repairs, after which it was ready for active service. The last two cars were not ordered sent by me to the new shop. 22186 was sent to the new shop for sides. HV 34715 had knuckle pin applied to B end, a running repair taking five minutes; after which it was ready for active service. C&O 68176 had air brakes cleaned and tested, taking about two hours and fifteen minutes. This was a running repair, after which it was ready for active service and was not ordered sent to any other shop. C&O 31009
55 received grab iron and raising board on A end, repacked as per rule 66, and brake step, bracket and carry iron bolt placed on B end. C&O 61548 receiving trucks spring cap and bolt and raising boards on A end—light running repairs, after which the car was ready for active service. It was not ordered sent to any other shop. 78194 received knuckle pin on the B end, which was a running repair and was sent to the new shop for paint. HV 21810 received rais-

ing boards on the B end, carry iron shim on the A end—a running repair taking one hour and fifteen minutes, after which it was ready for active service. C&O 54327 received knuckle pin on A end, raising boards, carry iron, shim on the A end, repacked as per rule 66, air brakes cleaned and tested—running repairs taking about three hours, after which the car was ready for active service and not ordered to any other shop. C&O 55792 received raising boards on the B end, taking about one hour, a light repair; it was not ordered to any other shop. C&O 37778 received grab iron starter on the A end, taking ten minutes, a running repair, after which it was ready for service, there being no further order directing it to any other shop. C&O 55046 received truck spring cap and bolt BL, a light running repair taking one hour. There was no further order on this car. C&O 51754 received knuckle pin applied on AB end side bearing shoes AR and AL carry iron shim on the B end—a light running repair. No further work was ordered. C&O 52224 was sent back to Number 2 Track for braces. Tie braces were placed, requiring two hours, after which it was ready for active service, there being no order made to send it to any further shop. C&O 113096 received knuckle shim on A and B end, side bearing bolts B. L. and sent to new shops for repainting. These were running repairs taking three-quarters of an hour. C&O 71375 were repacked as per rule 66 and cross-over pipe tightened, taking about one hour. It was not sent to any other shop. C&O 38740 had a draft gear
56 applied, taking about 2½ hours, a light repair, after which it was ready for active service. It was not ordered sent to any other shop. 58533 was on the west end and 38740 on the east end. They would all be moved off together. Track Number 2 is used for the repair of any car that is placed on it and is on the south side of the yard. It will accommodate about twenty-five cars. It is on the north side of the light side repairs yard Number 1, being the most northerly track and Numbers 2, 3, 4 and 5 being south of it. The next track south of Number 5 is the old lead, which is not numbered. Number 18 is in the east bound Transportation Yard. As trains come into the Russell Yards cars are switched out for repairs and placed on Number 18 and then moved to one of the five repair tracks. Ordinarily they are moved off Number 2 track after all the repairs are completed in the evening or morning or sometime during the night and other cars on Track 18 are placed on Track Number 2 for repairs. Cars

repaired on Track Number 2 on November 29, being the cars referred to, would be switched into the east bound Transportation Yard where trains pull into and are made up. Trains going to other parts of Kentucky and other states are made up in the Transportation Yard. The C. & O. railway extends into West Virginia and Virginia and trains enroute west or points east of Kentucky are made up in this Transportation Yard. Russell is a division of the railroad and all freight trains are inspected for any running repairs necessary to be made. If running or heavy repairs are found necessary on any cars they are shopped out of the train, the repairs made and the cars are then moved onto their destination. Some repairs are made in the Transportation Yard and after the repairs are made the cars sent on to their original destination. If running repairs are necessary they are made at Russell for the purpose of expediting the movement of these cars to their destination. The C. & O. Railway extends westerly through Ohio, Indiana and Illinois and
57 does business in Peru, Garrett and Hammond, Indiana.

The train enroute from Ohio to Virginia on the C. & O. lines has to operate through Russell, Kentucky and when that train comes into Russell it is customary for the cars to be inspected for the making of any running repairs, in which case the movement of these cars are disconnected until the repairs are made. Some of the repairs can be made while the cars are on the train. Where they require the work of one and a half or two hours they are switched out of the train so as not to hold it up, the car is switched out of the train immediately and the necessary time they generally take for running repairs is, I suppose, about eight hours. If the cars were moved I had no record of them. The principal business of the C. & O. Railway Company is hauling coal from the mines of West Virginia and Kentucky. Flat bottom cars are built with a flat bottom and the open type with the bottom sloping so that they can be opened to let coal out. Some of the flat bottom cars have opens in the bottom. The cars on Exhibit 1 were supposed to have come in on trains from the west. They came in, say from states like Illinois, Indiana and Ohio from the west and go to states like West Virginia, Virginia and states to the east.

Cross-Examination.

Trains from the west might come from points in Kentucky and trains in the east might go to Kentucky.

On Recall Direct Examination.

The repairs had not been made to the cars on Plaintiff's Exhibit 1 when the check of the same was made at 9:35 A. M. on November 29. They are removed after the repairs are made. The cars checked at 9:35 A. M. that morning must have been cars placed on the track after the cars moved from it at six A. M. had been moved off. They were placed there at 9:35 A. M. The shop crew started the work on that shop track on November 29 at 7:30 A. M. and worked until 4:00 P. M. except a half hour for lunch between 11:30 and 12:00. We had no night crew working on this shop track. Cars repaired on Track 2 on November 28 were repaired be-
58 tween 7:30 A. M. and 4:00 P. M. November 28 and 9:35 A. M. November 29. It was the practice but not at all times, for the cars to be moved off before 7:30 A. M. but sometimes the cars repaired the day before are not pulled until some time the next day. Exhibit Number 2 is a list of Number 2 Repair Track east bound yard for November 28, 1930 and consists of twenty-one cars. They were placed and delivered the evening of November 27 or the morning of November 28 and repairs were made then between 7:30 and 4:00 P. M. of November 28, 1930. They were moved before 9:35 A. M. November 29, 1930 and the cars shown on Plaintiff's Exhibit Number 1 were then placed on Track Number 2 for the repairs to be made on November 29. Those on Exhibit Number 2 were checked from the east end of the track. Light running repairs consuming approximately two hours were made to the first car on the list C&O 38740. Draft-gear applied on BN and the car was then ready for road service. It required no further repairs to be sent to the shop. The next westerly car was C&O 20031, which was sent to the new shop. The slip doesn't say for what purpose it was consigned to the new shop while it was on my shop Track Number 2, and that is what its destination was. Following that is 58038 repacked as per rule 66, air brake cleaned and tested. This was light running repairs and required two and a half hours and it was then ready for the road. No repairs were made to C&O 20031 on Track 2. No work was done on C&O 54069 to be sent to the new shop on account of the new sill. On C&O 65102 the air brake was cleaned and tested, a light running repair taking two and a half hours. The car was then ready for the road and for the continuance of its movement. On C&O 56207 the tripple valve was cleaned and tested, a light running repair taking one-half hour, after

which the car was ready for road service. The next car was VGN 11838. VGN stands for Virginian Railway Company, which runs through West Virginia and Virginia. No
59 part of it extends into Kentucky that I know of. It was repaired with one 1-inch by 10-U brake hanger L. 4., a light running repair requiring three-quarters of an hour. It was then ready for movement. I do not know where to. It was on the east bound repair track used for east bound cars. Virginia is east of Russell, Kentucky so if it was enroute back to the Virginian Railway Company, it would be enroute through Russell, Kentucky and east of Russell, Kentucky into Virginia and West Virginia. We made the repairs because the cars were not in safe running condition. It was our practice to make repairs to foreign cars in order to expedite the movement of these cars to their respective railroad carriers if they were going back there. I don't know where this car was going. The Virginian Railway cars are pulled out to the east. It could have gone back to the Virginian Railway Company or to West Virginia to the coal mines. It was empty. It is not at all times a practice to return empty coal cars to their respective carriers. Sometimes the C. & O. Railway Company has foreign cars leased. Wab. 8505 had the air brake cleaned and tested, as per rule 60, light running repairs, taking two and a half hours, after which it was ready for future movement to its destination. The Wabash Railway Company is in Indiana and does not come into Kentucky. The C. & O. connects with it in Indiana. C&O 17916 was repacked as per rule 66, side patched, a light running repair taking approximately two hours, after which it was ready for the road. C&O 33145 had coupler removed and rivits applied on the B end, light running repairs taking about three and one-half hours, after which it was ready for the active service. C&O 30958 received light running repairs taking about three and one-half hours, after which it was ready for active service. NKP 31549 is a Nickel Plate Railroad car. Nickel Plate is located in Ohio and Indiana. No
60 part of it extends into Kentucky. The C. & O. has a connection in Ohio and Indiana. It received light running repairs, taking about three hours, after which it was ready for road service. HV 13877 received light running repairs, after which it was ready for road service. C&O 64481 received light running repairs, taking about four and one-half hours, after which it was ready for road service. CC&O stands for Carolina, Clinchfield and Ohio Railway Company.

I do not know whether it extends into Kentucky. Light running repairs were made to CC&O 44035, taking about one and one-half hours, after which it was ready for the road. SBPX stands for the name of some coal company, a private car line. Light running repairs were made to SBPX 201, taking about ten minutes. C&O 34679 received light running repairs, taking about three and one-half hours. It was then ready for road service. C&O 33282 received light running repairs, taking one and a half hours and was then ready for road service. No repairs were made to C&O 33555 which was sent from Parsons Yard in Columbus, Ohio to the new shop at Russell, Kentucky. I do not know what work was to be done. It was first placed on Shop Track Number 2. HV 21342 is a Hocking Valley car which came from Parsons Yard, Columbus, Ohio to the new shop at Russell, Kentucky and was placed on my track before being sent to the new shop. The new shop is about one or one and a half miles west of Track Number 2 and Columbus is north of Russell, the railroad from Columbus to Russell extending in a northerly direction. Running repairs, taking three-quarters of an hour were made to 61355 and it was then ready for road service. The cars numerated were stationed on the track with 38740, the most easterly car and 61355 the most westerly car. In order to move car 33555 off the shop track to the new shop it was first necessary to move either the car east of it or the car west of it in order to get hold of this car. I don't know how it was moved. The practice on November
29 was to move all of these cars off the track at
61 the same time. The cars going to the classification track would be moved there, those going to the new shop to be assigned to another track to go to the new shop and would be moved at the same time. Car 33555 could not be moved to the new shop without moving the cars east or west of it. The repairs I have told about were all made to these cars and those that were taken to the new shop were taken there for the work called for so far as I know. Another crew, the switch crew, would do that work and I had nothing to do with it.

Plaintiff's Exhibit 13, being Exhibit 1 in the deposition of John A. Robbins, was introduced and was as follows:

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

Switching Report for Car Repair Tracks.

Mr. G. Y. M. Place Russell, Ky.
Date 11-29 1930 Track No. 2 Time 9 35 AM M

Initials	Number WE	X	Remarks
	58533		
HV	14908		New shop paint
	75686		New shop paint
	112161		New shop paint
	20439		New shop
	110140		New shop paint
	22371		New shop
HV	13062		New shop paint
	70311		
	33782		
	22186		New shop
HV	34715		
	68176		
	31009		
	61548		
	78194		New shop paint
HV	21810		
	54327		
	55792		
	37778		
	55046		
	51754		
	52224		Set Back
	113096		New shop paint
	71375		
	38740		

Note.—.....Indicate Empty
X Indicate Loaded.

Reported this track by phone at 4 P M M.

J. H. BURNS,
Foreman.

Plaintiff's Exhibit 14, being Exhibit 2 in the deposition of John A. Robbins, was introduced and was as follows:

62 THE CHESAPEAKE AND OHIO RAILWAY COMPANY

Switching Report for Car Repair Tracks.

Mr. G. Y. M. Place Russell, Ky.
Date 11-28 1930 Track No. 2 Time night M

Initials	Number EE	X	Remarks
	38740		Set Back
	20031		New shop
	58038		
	54069		New shop
	65102		
	56207		
VGN	11838		
Wab	8505		
	17916		Hold for orders O K
	33145		
	30958		
UKP	31549		
HV	13877		New shop paint
	64481		
CC&O	44035		
SBPX	201		
	34679		
	33282		
	33555		New shop
HV	21342		New shop
	61355	X	

Reported this track by phone at 4 P M M
Note. ....Indicate Empty.
X Indicate Loaded.

J. H. BURNS
Foreman.

Other exhibits referred to in the deposition were not introduced in connection with it.

63 JAMES B. MOORE:

Direct Examination.

I will be forty-one years old June 30, 1931. I received my injury in the Russell Yards, Russell, Kentucky, while working for The Chesapeake and Ohio Railway Company, by whom I had been employed for ten years and two months as a brakeman. My duties were switching cars, classifying freight, pulling and refilling shop tracks, and cabbing trains. The railway company maintained at Russell a terminal or yard or division point where trains pulled in to be switched. Shop cars are switched out of them and trains classified and switched to be sent to their destination. The next division point west is Stevens Yards, 135 or 140 miles from Russell, and twelve miles east of Cincinnati. It is on the main line which goes to Chicago. Parsons Yard is a terminal maintained at Columbus, Ohio. That line extends south and joins the main line at Lineville, Kentucky, 18 miles west of Russell, and continues eastwardly over the main line to Russell. Raceland is on the main line 3 miles west of Russell, and the Russell car shops, new shops, what they call the Raceland shops, are located a mile or a little further west of Raceland. Trains coming from Columbus having in their trains cars going to the Russell car shops at Raceland, Kentucky, cross the main line before you get to Russell, and it has not been the practice for these trains to stop at Raceland and take cars out. There is no yard there for switching them out, and they continue to Russell. Cars consigned to the shop at Raceland are switched out of the train and put on Track 2 and from there they go to 20 and from there to Raceland. That was the practice on this railroad at all times I worked there. Repair tracks are maintained in the yard at Russell, the east bound consisting of five tracks including No. 2. They are used for outdoor running repair track, that is, repairs such as can be done in four or five hours. I have heard
64 the term "running" or "light" repairs used. Similar tracks were maintained on the west side of the yard at Russell. Those on the east are used for cars going east, those on the west being used for cars going west. No equipment for making heavy repairs was maintained at either the east or west bound repair tracks. The repairs to a center sill is a heavy repair. Heavy repairs were made at Hunting-

ton, West Virginia, when I first started on the C. & O., C. V. Ratcliffe had charge of the shops. Cars coming to Russell, Kentucky, consigned to shops for the making of heavy repairs were sent to C. V. Ratcliffe, Huntington, West Virginia, at that time. The shops were moved from Huntington, West Virginia, to Raceland, Kentucky, something like a year before I got hurt. These cars were then sent to Raceland, Kentucky, to C. V. Ratcliffe. These cars would be taken off Track 2 and taken to Raceland about 8:00 o'clock in the morning daily. The route used in so doing was as follows: They were taken down Track 20 and go down the receiving yard lead to the interlocking, across three main lines to the lead into the new shops through a gate. The distance from Track 20 to the Raceland shops would be a mile and a half. The repair tracks at Russell, Kentucky, are in the open. The shops at Raceland, Kentucky, are closed. Separate departments have charge of running repairs at Russell on the west bound repair tracks and heavy repairs to Raceland, Kentucky. Mr. Collins was in charge of the repair tracks at Russell, while Mr. Ratcliffe had charge of the shops at Raceland, Kentucky. At Raceland equipment is maintained for the making of heavy repairs and the painting of cars. There was no such equipment in the Russell yard. Running repair tracks were maintained at Columbus, Ohio, for cars going through Columbus, and at Stevens yard, Kentucky.

I was hurt near six o'clock in the morning, November 29, 1930. It was dark and I had a standard signal lantern with me. The crew consisted of Conley, conductor, Berkhardt,
65 one of the brakemen, the engineer and fireman and myself, a brakeman or switchman. When I got hurt, I was switching out cars for the Raceland shops. We got the cars from Track 2 in the east bound repair yard at Russell, Kentucky. The track holds about 25 cars and extends east and west. We went up the shop track lead to Track 2 and headed in there, engine headed east, and coupled on to the west end and the cars were pulled out from the west end of the track. The track was pretty well filled. After coupling on to the westerly end of the cut the rest of the cars were coupled up and moved off track 2 to the west on to the shop lead track, on which track I later got hurt. I had the switches all lined up and as the engine and cars moved west on Track Number 2 I caught on to the head end of the second car east of the engine for the purpose of receiving and transferring signals to the engineer. That was part of my duties. I got on the

sill step on the east end of this car, which was Hocking Valley 21,342. That car come from Parsons Yard, Columbus, Ohio, on the C. & O. Railroad. The railway used a BF 4 form card, 4 inches wide and 8 inches long, tacked to the side of the car to designate the destination of cars like this. This form has been used for a year. I saw such a card on this car, and looked to see what was on it. This information was placed on these cards in the usual business of the C. & O. Railway Company. The BF 4 form card said: "From Parsons Yard, C. F. Ehrman to Raceland shops, broken center sill, to C. V. Ratcliffe." C. F. Ehrman was the general foreman of Parsons yard, Columbus, Ohio. C. V. Ratcliffe was foreman of the Raceland Shop at Raceland, Kentucky. The broken center sill indicated heavy repair, for the making of which there was no equipment or facilities on Track 2 at Russell, Kentucky. Equipment for such heavy repairs was maintained at the new shop at Raceland, Kentucky. The third car from the engine was C. & O. 33,555, and had a similar card to that on HV 21,342. I observed and read what was on that card. The car came from Parsons yard, Columbus, Ohio, and was going to Raceland to the shops for heavy repairs. The cars between
the Hocking Valley and the engine was a C. & O. steel
66 hopper car, the number of which I did not get. I do not
know whether it was loaded. The cars came to a stop after we got them to the lead track. Conley was lining up switches. The cars were moved to the lead track to get out cars for the Raceland shops and whatever loads was in there. The cars for Raceland shops are put on Track 20. Track 20 was the next track east of the lead where the engine and cars stopped. In order to get the HV 21342 and the C. & O. 33555 out onto track 20, inasmuch as these cars were the second and third cars east of the engine and were coupled to other cars east of them, we would have to switch them out until we got to those cars, switch out the cars on Track 20 to Raceland Shop and the others on the lead out of the way. That is what I was doing that morning. After these cars were taken from Track 2, cars then on Track 18 were to be placed on Track 2 for repairs. Berkhardt uncoupled the easterly car, a Raceland shop car, which went to Track 20. My duty was to cut the next car, which was not going to Track 20 but by the lead. There is a cut lever or uncoupling lever fastened on to the knuckle lock that connects on to the draw bar and coupled to the end pin; push down on the outer arm and that raises

the knuckle lock and permits the car to uncouple. One of these levers is on each end of the car and on opposite sides. It consists of two parts, the inside and outside arm. The inside arm is connected to the knuckle lock and to a lug on the end sill. The knuckle lock and lock block are the same. The lock block enters the coupler and locks the knuckles of the couplers together, and in order to uncouple the cars it is necessary to get the lock block up out of the coupler to release the coupling by operating the lever. The two arms are about 2½ feet long. Both parts are connected to the lug on the end sill. You shove down on the outside arm which raises the inside arm. The lever is about flush with the outside of the car and about four inches below the end sill which gives clearance for your hand. That pulls the lock block out of the coupler, frees the knuckle and the cars separate. In taking hold of the push-down type of lever it ordinarily and usually does not require the brakeman to put any part of
67 his body between the cars to effect the uncoupling.

Berkhardt uncoupled the first car while moving, called a kick-off. In a kick-off as soon as the lever uncouples the car the engine and cars coupled to it stop and the car that is uncoupled goes on, coming to a stop of its own accord or against other cars. I shoved down on the lever to operate the lever on the third car, the lever on the second easterly car being on the opposite side of the train, and that on the third car being on the south side. I could uncouple the third car by operating from either car. It was a push-down type lever. I pushed it down and it went so low it pulled my body between the cars and unbalanced me and throwed my hand under the wheel and mangled my hand. I took hold of the handle of the lever and shoved it down in a normal, usual and ordinary way. Ordinarily the lever makes a drop of 12 or 15 inches. On this occasion is made a drop of two feet at least. Ordinarily in operating a lever of this type, the handle descends to not to exceed 18 inches from the top of the rail. This lever descends two inches or more below the bottom of the axle. The bottom of the axle is 13½ inches above the top of the rail. The handle of the lever was two inches below that or within 12 inches of the rail. The knuckle did not come up out of the coupler and the knuckle did not release the coupler so as to effect an uncoupling at that time. The cut lever pulled my body in between the cars because it went so low and was bent down and twisted where the bolt went through the outside arm. I had operated

many levers like this, but never observed one bent as this one was. The lever went past the center of the wheel and inside of the rail when I pushed it down, and my body went between the cars inwardly about two feet from the outside part of the car in front of the wheel, and my right hand was caught, run over and mangled by the wheel. This was a hopper car with a diamond arch bar, there is no other kind. I operated the lever on the east end and south side of the car. The lever was right in front of the brake shaft at which I grabbed to pull myself out. Plaintiff's Exhibit 15 is a picture of the lever and car I got injured with.
68 The bend occurred where the bolt goes through the lever. The stop is over the inner part of the arm and controls the distance that the outside arm can go down. It is ordinarily so maintained that it will stop the downward action of the lever at not to exceed 15 inches. The inside arm comes in contact with the stop. The stop on this car was bent up so that there was three or four inches clearance from the top of the arm to the stop with the lever in the position indicated in the picture. The lever could still go lower in the condition this stop was in. Plaintiff's Exhibit 15 is a true and reasonably correct representation of the car and its appurtenances and the lever and the condition of the lever on the morning I operated it and got hurt. (Plaintiff's Exhibit 15 was examined by the jury.) After my hand went under the wheel I yelled. Berkhardt came and stood there until they shoved the cars, which were moving at 8 or 10 miles an hour, into the clear, the most easterly car being still coupled to the other cars when they came to a stop. Conley came to my assistance and they took me to the C. & O. hospital at Huntington, West Virginia. They put me under an anaesthetic and took my right hand off. I remained there until December 16, and suffered pain while in the hospital. I was in good health before the accident, six feet tall, and weighed about 210 pounds. I now weigh about 200 pounds. I have been treated by Dr. Elston, of Fort Wayne. My arm pains all the time, steady, and there is a shooting pain which comes and goes several times a day. I cannot stand anybody pressing against or touching my arm on the end. While I have been here it has become infected and has to be opened, and is that way now. The pain is not as severe as it was at the start, but there has been no improvement in the amount of pain since I left the hospital. I was nervous and upset and am unable to sit and concen-

trate for any length of time. I was not nervous like that before I got hurt. I made about $200.00 a month. I worked
for the C. & O. ten years and two months with the excep-
69 tion of about one month. We worked under arrange-
ments where the first man hired has seniority over men hired afterwards. My position was steady as long as I performed my duties. I have not worked since I got hurt. I was treated by Dr. Elston December 23, 1930, and January 12 or 13, 1931. The Chesapeake and Ohio Railway Company on January 15, 1931, maintained a ticket office at Marion, Grant County, Indiana, and was doing business in this district at that time.

Cross-Examination.

I went to work at 11:00 p. m. November 28, 1930. The yards are in the west end of the town of Russell, the yard limits being indicated by a board, the west limit being five or six miles below Russell and below the Russell car shops. The east board is near the east city limits of Russell. The shops are within the limits of the yards. We began switching cars off Shop Track 2 between 5:00 and 6:00 o'clock in the morning. I rode the engine in on Track No. 2 and sat there until the knuckles were opened by Berkhardt and the other brakeman. The engine moved eastward, coupled the cars together and backed out west with the cars. I caught up on the second car from the engine and rode with them eight or ten car lengths on the curve where they transfer signals. We pulled on the lead, stopped and throwed the switch over. I got off on the lead and stood there until I got the signal from the man near the head end to proceed eastward, and transferred it to the engineer. He moved forward. I observed the two cars HV flat bottom gondola 21342 and C&O flat bottom gondola 33555. I made no note of the numbers. I do not know the numbers of any other cars in that cut that night, nor do I know the number or initial of any other cars that I previously handled from 11:00 o'clock that night, as I had no occasion to remember any of the numbers. Thats the only two cars I read the cards on the side of. They was the only two cars in that cut like that. I always remembered the numbers of those cars, although there was no occasion for me to. I can not recall any other
particular numbers that I ever saw in my 19 years' ex-
70 perience. I charged my mind with these two cars whose
numbers I remember; it was part of my business to re-

member it on that night to make the cut, I remember what I read on those cards and without my memory being refreshed by any other source I always hold in mind the numbers of those two cars. I was not near them at the time of the accident. They were near the front end and the accident occurred at the east end. They were the second and third cars from the engine, one other car was between them and the engine. It was in the 61,000 series; I don't remember the whole number. We had some 64,000 series cars, a 24,000 series Hocking Valley, and 100,000 series. I don't remember the full numbers of any other cars. I thought about the two particular numbers when I was in the hospital and hundreds of times after the accident. They were the only two white tagged cars in the cut, and the particular occasion for bringing that to my mind hundreds of times was on account of the accident. I was thinking about the question of interstate commerce from time to time; right away, ten or fifteen days or something like that after the accident.

One car was cut off prior to the accident. I was westwardly, going toward the head end to do the cut. I had left the two cars whose numbers I remember and was walking toward the east end of the cut. I got on a hopper car, I don't know the number; had no occasion to know it. I had more occasion to notice the numbers of the other two cars than the one I got on the last time because it was in the line of my business. The two cars would have had to have gone to the Raceland shops after they had these tags on them regardless of their numbers. The first car was switched on to No. 20, and we were proposing to switch it up the lead out of the way, so that we could get cars on to Track 20 that were going to 13. We were going to kick the second car out of the way after we got the other car switched out and then couldn't take them to 13. I gave the signal that Berk-
71 hardt gave me, a proceed signal, with a lantern, after this car had been switched into Track 20. The engineer obeyed it. After that car was in 20, Berkhardt gave me a stop signal, throwed his switch, and gave me a proceed signal with his lantern to cut or kick one car up the lead, which I proceeded to do. I gave no other signals after I started to kick this eastern car up the lead except the one proceed signal, stop signal and another proceed signal.

The inside arm of the lever is connected to the knuckle lock which is also called the lock block. The lock block is down inside the coupler. The lever lays on top and the rest

of it is inside the draw bar. The length of the knuckle lock or lock block from bottom to top is 8 to 10 inches, the head of the coupler itself probably 12 inches. The lock block works entirely inside of the coupler or draw head, although a piece comes out the top. The up and down dimension of the draw bar is about four inches more than that of the lock block. How far the knuckle block can travel up and down in the coupler is according to how the stop is adjusted. It is not true that the stop is only put on as an emergency where something breaks and the connetcion between the lever and lock block is entirely separated. I don't know the depth inside where it works, but the lock block can come up further than what it takes to release the knuckle. I do not know that it is true that the lock block with an up and down dimension of 8 inches, working inside the draw head whose up and down dimension is 12 inches, can not have a travel of more than four inches. I have no idea how far the lock block could travel up and down inside the draw head.

I didn't feet the lever go solid. When I let go it was two inches below the bottom of the axle, the axle being approximately 13½ inches above the rail. The lever traveled to within one foot of the top of the rail or closer when I let go of it. It was below my knees a couple of inches. I was standing on the outside of the rail which is 6 inches high and it went 6 inches below my knee. It went a distance of two feet below the end of that sill.

72 Q. How far did it travel did you say on your direct examination, two feet?

A. Two feet or less.

Q. Two feet or less?

A. Two feet or more.

Q. How much did you say?

A. I didn't measure it I suppose; I am confident it went two feet down within a foot of the rail or closer.

Q. If I understand you right, when you first took hold of it it was approximately three feet above the rail?

A. No, sir, I didn't say that.

Q. Didn't you say that it travelled two feet down and stopped about a foot above the rail?

A. I never said anything about three feet; I said it went down within a foot of the rail to the best of my knowledge.

Q. If it travelled down two feet from the time you first took hold of it and stopped approximately a foot above the

rail wasn't it approximately three feet above the rail when you took hold of it?

Mr. Davidson: I object. It isn't a fair question. The fact that it dropped two feet doesn't mean it was three feet above the top of the rail.

The Court: That would necessarily follow.

Q. Read the question.

(Question read)

A. It must have been.

I didn't see any stop that night, but seen the bend in the lever right where the bolt comes through near the eye. This was toward the center of the car and I noticed it clearly that night. I saw the entire lever with my lantern from the handle on to the stop. I had little difficulty in getting hold of the lever in the first instance. The lock block couldn't come out of the coupler. I know how it happened, that the end of the lever was travelling two feet while the lock block was travelling about four inches, it depends on where it is coupled on the end sill and the lever being bent went on down. I
73 didn't bend the lever any in the operation. The two arms of the lever must be about the same length; where they fasten on the end sill is about the middle of the distance from the knuckle lock to the end of the car; the outer end of the arm reaches past the lock to get the inner arm and this enabled the lever to travel down two feet while the lock block was going up four inches. There is no hand hold or grab iron on the end of the car which is used for holding with the left hand while operating the lever with the right. The levers are not operated with the foot. I have heard of it and seen it done but it is not the proper way. I made only that one attempt to uncouple these cars. I did not push the lever down to where it stopped; it didn't hit anything solid. The lever overbalanced me pulled me between the cars before it hit something solid. I grabbed hold of the brake shaft but hit the end sill. I wanted to shove myself out. The brake shaft is south of the draw bar right by the lever two feet or more from the outer edge of the car and extends down through the end sill. I caught at it above and just at the top of the end sill. I reached for the brake shaft when I was bent between those cars. No part of me touched the ground or ballast. I hit the end sill with my left hand. I had a lantern in my right hand, it went under the car my hand went under the wheel. The first person I saw was Berkhardt after the accident. The train stopped right immedi-

ately after the accident. Berkhardt stopped it. Berkhardt ran to me. I had got up; cars made no attempt to stop, went over my hand; the car wasn't cut off. The stop was made after that time. At the time of the accident the slack was shoved up in the train and ran out when he stopped the engine. I suppose I was two or three car lengths from the east car of those that remained in the cut when the train came to a stop.

Redirect Examination.

I first saw the bend in the lever while I was between the cars. I had a lantern in my hand.

Recross Examination.

My head was right close to the bend; in that lever at the time I was in between the cars. I don't recall seeing
74 the stop. I hadn't seen the bend when I first took hold of the lever. When I saw it I was facing the draw bar my head was going toward the draw bar when I grabbed nearly opposite about from it and looking for something to grab hold of. I saw the brake staff about the time I saw the bend. They were right there together. I was east of the lever almost against it and between the cars. At this time my lantern was in my right hand between the cars.

ROLAND R. SCHULZ:

Direct Examination.

I am a lawyer, and got my professional education at the University of Kentucky.

The witness identified Plaintiff's Exhibit 16 as the State of Kentucky's liability act against railroads relative to intrastate commerce known as the Kentucky Employers' Liability Act.

Q. I will ask you to state to the jury what the law in Kentucky was in that respect in full force and effect on November 29, 1930, in the State of Kentucky.

Mr. Cole: To which question the defendant objects for the reason that the evidence sought to be elicited by the question propounded to this witness could have reference solely

to this action to the second paragraph of the complaint, of which the Court has no jurisdiction, for the reason that the second paragraph of the complaint expressly declares upon a cause of action arising out of a law of the United States and is a suit of a civil nature arising out of such law, the same being the Federal Safety Appliance Act; that by the provisions of Section 31 of the Federal Judicial Code no suit shall be brought in any District Court against any person by any proceeding in any other District than that whereof he is an inhabitant, it being both alleged and proved in this case that the defendant is an inhabitant of the State of Virginia, that the mere fact that a diversity of citizenship exists or is claimed to exist confers jurisdiction only where the jurisdiction is founded only on the fact that the action is between citizens of different states, in which event it
75 can be brought in the District of the residence of either the plaintiff or defendant; but this case does not come within the exception contained in Section 31 for the reason that the jurisdiction is founded not solely upon diversity of citizenship but the fact that the case arises under the law of the United States.

The objection was overruled by the Court, to which ruling the defendant at the time excepted.

The witness then answered as follows:

A. This was the law: That every common carrier by railroad while engaged in commerce in this State shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, to his or her personal representative for such injury or death to such employee resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, docks, boats, wharves or other equipment. In all actions hereafter brought against such common carrier by railroad, or by virtue of any of the provisions of this Act to recover damages for personal injury to any employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; provided, that no such employee who may have been injured or killed shall be held to have been guilty of contrib-

utory negligence in any case where the violation of such common carrier of any statute, State or Federal, enacted for the safety of employees contributed to the injury or death of such employee. That in any action brought against any common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any employee, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute, State or Federal, enacted for the safety of employee, contributed to the injury or death of such employee.

The defendant moved to strike out the answer for each of the reasons stated in the objection to the question. This motion was overruled; to which ruling the defendant at the time excepted.

76 DR. EDMUND VAN BUSKIRK:

Direct Examination.

I am a physician and an ex-ray specialist, and took an ex-ray picture of the right arm of the plaintiff, the same being PLAINTIFF'S EXHIBIT 17, which was introduced in evidence. The amputation is about two-fifths of the distance from the wrist to the elbow. There is a slight absorption of bone where it is sawed off on the ulna radius which is somewhat painful and permanent.

It was stipulated that Plaintiff's Exhibit 18 is a true and correct statement of the original point or origination point of the cars thereon shown which are the cars referred to in plaintiff's Exhibit 14. PLAINTIFF'S EXHIBIT 18 was admitted in evidence and is as follows:

Car Number and Initial		Arrived at Russell — Engine	Date	Time	Original Point picked up by this train	Time and date picked up
C&O	38740	2325	11/19	6:20 PM	Stevens Ky	1:30 PM 11/19
C&O	20031	3036	11/25	1:30 PM	Columbus O	9:30 AM 11/25
C&O	58038	3036	11/25	1:30 PM		
C&O	54069	3036	11/25	1:30 PM		
C&O	65102	2314	11/27	6:00 AM	Stevens Ky	12:45 AM 11/27
C&O	56207	2314	11/27			
VGN	11838	3014	11/25	7:10 PM	Columbus O	3:30 PM 11/25
Wab	8505	3037	11/24	10:15 AM	Columbus O	6:00 AM 11/24
C&O	17916	2343	11/23	1:00 AM	Stevens Ky	8:45 PM 11/22
C&O	33145	2305	11/26	8:05 AM	Stevens Ky	3:15 AM 11/26
C&O	30958	2305	11/26			
NKP	31549	3021	11/26	8:25 AM	Columbus O	4:00 AM 11/26
HV	13877	2306	11/22	3:30 PM	Stevens Ky	8:30 AM 11/22
C&O	64481	3018	11/25	7:30 AM	Columbus O	2:30 AM 11/25
CC&O	44035	2324	11/26	8:00 PM	Columbus O	4:30 PM 11/25
SBPX	201	1229	11/26	11:20 AM	Stevens Ky	5:00 AM 11/26
C&O	34679	No Record				
C&O	33282	2317	11/27	8:40 AM	Stevens Ky	3:30 AM 11/27
C&O	33555	No Record				
HV	21342	No Record				
C&O	61355	1353	11/27	8:00 PM	Vances Ohio	12 noon 11/27

77 JOHN ROBBINS:

Direct Examination.

I am Car Foreman for the C. & O. Railway Company at Russell, Kentucky. Plaintiff's Exhibit 14 shows the cars on Track 2 from east to west. Exhibit 18-A shows light running repairs to car C&O 38740. Plaintiff's Exhibit 19 is the November 28 record of C&O car 20031, on which we made no repairs but which we sent to the new shop for repairs. Our department was not the new shop, which was about three quarters of a mile west of Raceland. For about a year all heavy repairs were done there. Plaintiff's Exhibit 20 is a record of light running repairs to car C&O 58038, requiring about two hours and a half. Plaintiff's Exhibit 21 is the record of repairs to car C&O 54069. Repairs were made and it was sent to the new shop for repairs required on it. Plaintiff's Exhibit 22 is a record of light running repairs on car C&O 65102, requiring about one and three-quarters hours. Plaintiff's Exhibit 23 is a record of light running repairs made to car C&O 56207, requiring about an hour. Plaintiff's Exhibit 24 is a record of light running repairs to car VGN 11838, requiring about an hour. Plaintiff's Exhibit 25 is a

record of light running repairs to car Wab. 8505, requiring two hours and fifteen minutes. Plaintiff's Exhibit 26 is a record of light running repairs to car C&O 17916, requiring about an hour. Plaintiff's Exhibit Number 27 is a record of repairs to car C&O 33145, requiring two hours and a half. Plaintiff's Exhibit 28 is a record of light running repairs to car C&O 30958. Plaintiff's Exhibit 29 is a record of light running repairs to car NKP 31549, taking about two hours and a half. It was not then consigned to the new shop for a paint job. Plaintiff's Exhibit 30 is a record of light running repairs to car HV 13877, requiring three hours. It was not then consigned to the new shop for a paint job. Plaintiff's Exhibit 31 is a record of light running repairs to car C&O 64481, taking three and one-half hours. Plaintiff's Ex-
78 hibit 32 is a record of light running repairs to car CC&O 44035, taking an hour and a half. Plaintiff's Exhibit 33 is a record of light running repairs to car SBPX 201, taking about ten minutes. Plaintiff's Exhibit 34 is a record of light running repairs to car C&O 34679, taking two and one-half hours. Plaintiff's Exhibit 35 is a record of repairs to car C&O 33282. Plaintiff's Exhibit 36 refers to car C&O 33555, upon which no repairs were made on Track Number 2. Plaintiff's Exhibit 37 is a record of car HV 21342 on which no repairs were made. Plaintiff's Exhibit 38 is a record of car C&O 61355; on which light running repairs, taking about thirty minutes were made. Exhibits 18-A to 38 inclusive were then admitted in evidence, the substance and purport thereof being as follows:

These exhibits were each on a form headed The Chesapeave and Ohio Railway Co. Foreign-Car Repair Record, on which was entered the car number and initial or name of the carrier, the date, the name of the inspector and certain information in columns headed "End," "Repairs Made," "Material, Weight, Kind," and "Why Made," the information so shown on said respective exhibits with reference to each of the cars respectively shown thereon being as follows:

Exhibit	Car	End	Repairs Made	Material Wt.	Material Kind	Why Made
18-A	38740		Draft Gear		B	
19	20031		New Shop			
20	58038		Air-Repacked rule 66—Air cleaned and tested, Defect P cup			
21	54069		Air new shop—ioose sil			
22	65102		Air cleaned and tested			
23	56207		Air—Triple changed and tested Defect triple			
24	VGN 11838	I4	1—11" x 10" U Brake hanger			Bro
25	Wab. 8505		Air—ABCOT & St. (N. A.) Defective per rule 60 Wab. 9-19-80—K 1 trip R & R Std to car Ret valve COT 1 new 8" PC Wabco Bet 3—23			Dirty W. Out
26	17916		Repacked rule 66—Patch side			
27	33145		Coupler K Rem B		A	CBR

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Exhibit	Car	End	Repairs Made	Material Wt.	Material Kind	Why Made
			Air cleaned and tested. Ret pipe lightened in triple air OK Miller—3 connections			
28	30958		Coupler 13 Repacked Rule 66		CBR	
29	NKP 31549	A&B	25 H ARA Knuckle Pin		Pin	W O
			2 K Pin cotter			W O
30	13877		Repacked Rule 66			
			Draft gear—K Pin B		B	
31	64481		Draft gear		A&B	
32	CC&O	A	1 3/4 x 17 Grab			
		A	iron single off set		W	Bro
		A	1—5/8 x 1/2 bolt			accep
		A	1-5/8 x 2" bolt			
		B	1—New Knuckle pin			W O
		B	1—K pin cotter			Miss
33	SBPX 201		No bill			
34	34679		C Iron bolts		A	
			Coupler Y R		B	
			K pin B			
35	33282		Air Rep rising boards		AR	
36	33555		New shops C. F. Erhman			
37	HV 21342		New shop C. F. Erhman			
38	61355		Jack up B 2—Brass R 2			

The foregoing exhibits were together numbered Exhibit 2 in the deposition of John Robbins theretofore introduced.

Plaintiff's Exhibit 14 shows all repairs made at our department. Somebody takes the numbers of all the cars on that track every day. This is the record that shows the cars

and their carriers on Track Number 2 on November 28, 1930 and is a correct record. Car C&O 38740 was the most easterly car and the checker moved west to 61355 of the most westerly car. Next east of C&O 61355 was HV 21342 and next easterly to it was C&O 33555. The check was made some time in the morning of November 28, 1930, at which time the cars were found in the respective positions indicated on the record. The repairs, all light running repairs, were made between 7:30 A. M. and 4:00 P. M. 61355, the most westerly car, loaded with sand from Vauces, Ohio and going to Surveyor, West Virginia, required some repairs taking a few minutes. The C. & O. extends through West Virginia and the route this car would take would be through Russell,
80 Kentucky. This car was inspected at Russell, taken out of the train, placed on Track 2, received the running repairs and after they were completed was ready to go on the trip to Surveyor, West Virginia. If it were moved from our track it would be moved to expedite its movements to Surveyor, West Virginia. Referring to car HV 21342, the card reads: "New shop—the Raceland shop—C. F. Erhman," who is the Foreman of the C. Y. O. repair track at Parsons Yard, Columbus, Ohio. Plaintiff's Exhibit 36, referring to C&O 33555 reads new shop, was going to Raceland, Kentucky and Erhman's name is on it.

Cross-Examination.

I have no knowledge of where the cars go after they leave my track. I do not know when 61355, the most westerly car, left the track. If the other cars were all empty and there was one loaded car, it would be the practice to get that car into a train and get it started as soon as possible. If it had moved separately the next car on the list, HV 21342, would then have been the most westerly car in the cut. I do not know whether HV 21342 and C&O 33555 ever went to the new shops. The new shops are about a half mile west of Raceland and Raceland reaches beyond our repair track on the south side. That is the corporate limits of Raceland extend east of the western part of our repair track but right to the south of it so that the repair tracks are adjacent and abut on the corporation line. The terminal yards at Russell extend about a half mile west of the new shops. The shops are located in the Russell yards. It extends both west of them and east of them.

The following questions were asked, objections interposed, offers to prove made, rulings made and exceptions taken:

Q. What was the practice from time to time as to cars which came from other divisions to the Russell car shop being held for some considerable period of time on some of the tracks in the yard before being sent to the car shop?

Mr. Davidson: To which question the plaintiff objects for the reason that we haven't gone into this
81 with any of the witnesses.

The Court: Objection sustained.

Q. What was the practice at Russell with reference to cars which came there to be repaired at the shops from other divisions, as to whether these cars were frequently held on different repair tracks for a considerable period of time before finally reaching the shops?

Mr. Davidson: To which question the plaintiff objects; we haven't gone into any practice—

Mr. Cole: The defendant offers to prove by this witness in answer to this question, that it was the common practice in the operation of the yards and shops at Russell, Kentucky that cars coming to the Russell Shops from other divisions were frequently held for considerable periods on different repair tracks, including repair tracks under the control of the witness, without being sent to the shops.

The Court: Objection sustained, and offer to prove overruled.

Mr. Cole: To which ruling of the court the defendant, at the time, excepted.

Q. What is the fact as to whether cars which came from Parson's Yard, under the direction of Mr. Ehrman, with the cards tacked on in the same form as Plaintiff's Exhibit "1," being form B. F. 4, after arrival at the Russell Yards were from time to time sent out on the road to be loaded without ever going to the Russell Shops?

Mr. Davidson: To which question the plaintiff objects on the ground that we haven't gone into that practice; we
82 haven't touched that at all.

Mr. Cole: The defendant offers to prove by this witness in answer to the foregoing question, that it commonly happened that cars of a kind described in the question were sent out on the road without being sent to the shops first.

The Court: Objection sustained, and offer to prove overruled.

Mr. Cole: To which ruling of the Court the defendant, at the time, excepted.

Redirect Examination.

The running repairs referred to were made on November 28, 1930.

83 RONALD STAGG:

Direct Examination.

I am actuary for the Lincoln National Life Company, and the expectancy of life for a man forty-one years of age is approximately twenty-eight years.

DR. L. W. ELSTON:

Direct Examination.

I first examined the plaintiff on December 23, 1930, and found an amputation stump of the right lower third of the forearm, which was not entirely healed. He stated that he had a great deal of pain, which I believed to be true. It was infected, painful, swollen, tender, and I thought it would take a considerable length of time for it to get healed up if it ever healed permanently. He had a few small areas, about as big as a pea, and I assume that they were nerve tumors which some sometimes develop on the ends of nerves after an amputation, and which are notoriously painful. I couldn't prove it possibly, but judge that is what they are. My opinion is that this man does have infection. This was the condition when I last saw him a few days ago. Two large nerves run down the sides of the arm and end in a spot right about there (pointing to plaintiff's arm) and when the spot on the inside is exceedingly tender if you press in there you can feel a small hard area; in my opinion these tumors are present there. This, as you see here, is an infection, and pus and inflammation are undoubtedly in there now. These tumors have a tendency to become progressively worse as far as pain is concerned, and in my opinion the condition is permanent and painful as long as the tumors are there. I would not say a one armed man could go back and do the work of a

railroad brakeman. It is pretty hard to say as to the prospects of improvement. It has dragged on now for months and is still infected and in my opinion very painful. I
84 don't know, of course, how it is going to come out. There is a permanent loss of the arm. The nerve tumor condition will, according to the natural course of events, not as a rule get any better; infection can be overcome by nature and a patient get well, or it can go on and become worse. If the pain and distress is due to neuromas (nerve tumors) I don't think that it is going to get better naturally. I do not think he would be able to attach an artificial limb to the stump as I couldn't touch his arm without causing considerable pain, and I don't think a cap could be worn over it with any comfort.

Cross-Examination.

I have dressed his incision a few times when he came up, several times, the last one being three or four days ago. I recall no conversation about my being a witness on the occasion of his last visit, although it was mentioned once before that I would probably be used as a witness. I get called occasionally in personal injury cases.

Redirect Examination.

I am a surgeon.

Recross Examination.

I don't see how he could very well drive an automobile, I don't know whether it would be possible. I don't think I would want to chance this man. He might drive an automobile with one arm. I would have to see it before I would believe it possible for him to drive from Columbus, Ohio, to Fort Wayne, Indiana, a distance of 300 miles or so.

JAMES B MOORE, recalled:

Cross-Examination.

I drive an automobile but not so very regular and not several times a week. Since the accident occurred I have driven two or three times to Raceland and Russell. My home is

in Fort Wayne and has been since January 13. I came here on January 11, 1931, to make my home.

Redirect Examination.

I have driven a car several years; this was a 1927 model.

85 Thereupon the plaintiff rested his case and the defendant to maintain the issues upon its behalf offered and introduced the testimony of the witnesses and the documentary evidence hereinafter mentioned, which testimony including that on direct, cross and redirect examination together with such documentary evidence, all in condensed and narrative form is as follows:

DEFENDANT'S EVIDENCE.

T. C. IRWIN:

Direct Examination.

I have been chief record clerk of The Chesapeake and Ohio Railway Company for about ten years, and it is my duty to see that the movements of cars over the system are entered in the records and I keep a record of such movements, which I obtain from the conductors' reports which are sent to the office of which I am in charge and there preserved. They are kept in the regular course of the business of the company and are correct. I have a record of the movement of car C. & O. 61355 for the period beginning approximately November 28, 1930. (The witness produced Defendant's Exhibit 6, compromising conductor's train reports or wheel reports.) These records show the leaving and arrival time of the trains, the stations being designated by symbols or numbers designating their distance from Fort Monroe. They show the numbers and initials of the cars of the train and whether they are empty or loaded. Car C. & O. 61355 started out of Columbus in a train going to Russell at 8:50 o'clock a. m. on November 26, 1930. It was then empty. It was set out at station CN 40, this being at RA junction on the northern division of the C. & O. railroad on the line between Columbus and Russell. It left there on the 27th in a

train going south of Columbus and went to Gregg, Ohio, loaded with sand. I do not know where it was loaded. It stopped at Gress and went into a Russell train on November 27, 1930, and arrived at Russell at 7:30 a'clock p. m., November 27, 1930. It left Russell at 6:45 o'clock p. m. on November 28, 1930, and went to Barboursville, the destination of the train being Hanley, West Virginia, about 65 miles east of Barboursville. The train in which it was taken from Russell to Barboursville arrived at Hanley at 12:35 a. m. on the 29th. The record does not show the hour
86 at which the cars arrived at intermittent points, but does show the time of the arrival of the train at its destination. This car left Barboursville in a train which left Huntington at 6:35 a. m. on November 29, and arrived with this car at Hanley at 4:55 p. m. on November 29. It went from Hanley to Quinnamont, West Virginia, leaving Hanley at 8:00 a. m. on December 3, and being set out at Quinnamont from a train which arrived at Hinton at 12:12 p. m. December 3. This car left Quinnamont at 1:00 p. m. on December 3, and arrived at Rowley at 2:30 p. m. on December 3, Rowley being the final destination of the train. It left Rowley at 4:05 p. m. on December 3 and arrived at Mabscott in a train which arrived at its destination at 6:25 p. m. on December 3. It arrived at Surveyor at 1:00 p. m. on December 4.

I also have the record showing the movement of cars C. & O. 33555 and HV 21342. They were in train 2321 leaving Columbus at 5:55 a. m. on November 27 and arriving at Russell, Kentucky, at 12:15 p. m. November 27. These two cars left Russell at 3:10 p. m. on November 29 in train X1456, and were taken to Logan, West Virginia, arrived there at 10.20 p. m. on November 29. Defendant's Exhibit 7, the wheel or car reports showing the movement of the two cars C. & O. 33555 and HV 21342 from 5:55 a. m. November 27, 1930, until their arrival at Logan, West Virginia.

Cross-Examination.

Car C. & O. 61355 left Russell at 6:45 p. m. on November 28. I do not know this of my own personal knowledge. I suppose errors are made in our records. This car, when it left Ohio, was consigned to Surveyor, West Virginia, according to the sheets. C. & O. 33555 and HV 21342 left Columbus November 27. They were not consigned to or bound

to Logan, West Virginia. They moved out of Russell into Logan. I do not know why they were stopped at Russell or that they needed repairs.

Redirect Examination.

87 While there is a possibility of human error, I do not think it would be possible for a mistake to have occurred as to the time when car C. & O. 61355 left Russell and all of the rest of the record during the rest of the trip of that car to its destination be correct. I do not think this could have occurred in this particular car. I have a complete record of that car.

Recross Examination.

I haven't the shop track numbers showing the time the car left shop track No. 2 at Russell, Kentucky.

EMERY BERKHARDT:

Direct Examination.

I am employed as yard switchman by The Chesapeake and Ohio Railway Company, and was a member of the crew that was doing switching when James B. Moore met with an injury. The crew consisted of W. F. Conley, myself and J. B. Moore. Workman was the engineer, and Nester the fireman. We began at 11:00 o'clock at night and cabbed trains—put cabooses on them, threw out bad orders, and long towards morning pulled off No. 2 shop track the cars that were on it. The engine was headed east, and went into the west end of the track. Conley and I opened the knuckles; they shoved them together and pulled them out west on the new lead with the engine backing. We went forth or fifty car lengths, I gave a kick signal and cut off a Roger ballast car. I made the uncoupling while the engine was moving and rode the car up to No. 20 switch. When it went in the clear, I threw that switch and got off. The other cars were back six or eight or ten cars. The next car was to go to No. 13. These switches went off the lead to the right, going east or to the south. I gave a signal for this move, which Moore transferred, and the cars started. I heard the

rumbling of the cars and heard Moore holler. I stopped the cars by a signal and went back to him. The foreman was east of me. I got to Moore and shut down on his arm to stop the blood. The cars were shoved down the lead, the en-
88 gine uncoupled, and Moore placed on the engine and taken to the west end of the yards. From there he was taken in an ambulance to Russell and stopped at A. J. Francis' for first aid, and from there to the Huntington hospital. This occurred about 6:00 o'clock; it was dark and the weather fair.

Cross-Examination.

A set back is a car that has to be set back on a track where it is taken for further repairs. Frequently we take them out out but would leave the set back there and move out with the others. We were switching these cars from west to east. With the push-down type of lever you take hold of the handle of the lever and push it down. I never operated a push-down type of lever that went so low to a point less than a foot from the top of the rail. It would seem like that would be too low. Ordinary levers go over the top of the wheel but not between the cars past the wheel. The car I uncoupled was put on Track 20 and was going to Raceland. Other cars in that string were also going to the Raceland shops. We were switching out the bad orders. Quite a lot of repair work was done at the shop at Raceland. We had some cars for Raceland in there, and put them on Track 20. After that they would be taken to the new shop. The first car I cut off was a car going to Raceland on No. 20 Track. I signaled to Moore to cut off the next car and he transferred it. He was to make the next uncoupling of one car. This car wasn't uncoupled. The car he was to cut off was not cut off. It was still coupled to the train. I saw his right hand was mangled, and got to him right immediately after I heard him holler. I was five or six car lengths from him, I guess I got to him in about half a minute and asked what happened. He said it was a low-lift lever, he went to make the cut and lost his balance. He said low-lift lever, I don't know what he meant. I have cut several of them but don't know as I saw any of them lower than commonly. I cut those cars with my feet. I understood him to mean that this lever went too close to the rail.

Redirect Examination.

To operate the push-down type of lever, I get on the
89 car and get hold and shove it down with my foot. I figure that is a much safer method.

W. H. WORKMAN:

Direct Examination.

I am an engineer employed by The Chesapeake and Ohio Railway Company, and went to work at 11:00 p. m. on November 28, 1930, with Nester fireman, Conley conductor, and Berkhardt and Moore switchmen. We were switching in the west end of the yards at Russell, Kentucky. Between 5:00 and 6:00 in the morning, we started to pull the No. 2 shop track. There were around 20 cars which were standing apart with four or five feet of space between each two cars. We went in from the west and with the engine headed east coupled on to the cars, shoved them together, stopped the engine and the slack pulled on out. We then pulled the cars out on the lead and shoved them ahead. The shop lead connect No. 2 track with the yard lead. We then shoved the cars up the yard lead in an easterly direction. He then gave me a kick signal indicating to kick the cars or move them fast. I did this, and then received a stop signal. I then stopped for about a minute and received another kick signal from a man up at the other end of the cars, upon which I acted. I could not see where they were going, but depended solely on the signals from the members of the crew. I received another stop signal and stopped in the length of about two cars. We had been moving eight or ten miles an hour. I then received a signal to go ahead slow and shoved the cars slow. When I passed Berkhardt I saw he had hold of Moore's hand. The conductor gave me a signal to come on and shove the cars in the clear. I then backed the engine to where Moore was standing. We bound his wrist. He was put on the front end of the engine and backed up to where we could get an ambulance. I did not see him any more, and we did no more switching that morning, our regular quitting time being at 7:00 a. m.

W. F. CONLEY:

Direct Examination.

90 I am employed as yard conductor by the C. & O. railroad, and on the night of November 28 and morning of November 29, 1930, we were working in what is known as the west end light side in the west end of the Russell yards. Something after 5:00 o'clock we started to pull the No. 2 shop track. I opened the knuckles; Berkhardt was opening knuckles on another train, and Moore was near the engine. We gave the engineer a signal to come ahead, which he did, and the cars coupled. He had come in from the west end and backed out to the west pulling the cars about thirty car lengths to get on the yard lead. I stayed to line up the tracks by throwing the switches. The first car, one for the Russell shop, went to Track 20. The next was to go to No. 13. We were not making up trains but just yard switching—classifying cars. We did not know where the cars would go. They came up the lead with the cars, and Berkhardt cut off the first car which was to go on 20. I throwed 20 over for the lead; the next car was going to 13. After the first car had gone on to 20, I threw the switch back so that the cars on the lead would go past No. 20. A go-ahead signal was given by Berkhardt. Moore was to cut the next car off, and didn't cut it. My attention was attracted when Berkhardt hollered and told me Moore was hurt. I cut the engine from the cars, got the stretchers, and came back to where he was and he was put on the engine. The accident occurred about ten cars west of No. 20 switch. The blue print, Defendant's Exhibit 8, correctly represents the lawout of the Russell yards. The first track is the main line, of which there are two. Just south of it is No. 1 shop track, and next to it No. 2, which come together at their western ends in what is called the shop lead, to which these cars were taken from No. 2 shop track. The yard lead is the 9th tracks from the north, 13, 18 and 20 being numbered consecutively from the north and located south of the yard lead. 11 takes off the yard lead furtherest east, 11 to 20 coming off this lead and the other tracks south of that from another lead. (DEFEND-
91 ANT'S EXHIBIT 8 was admitted in evidence.) I stayed until the ambulance came, and then came back up in the yard on to the lead opposite the yard office and

stopped. We then went east and it was 7:00 o'clock, time to be released. Nippert, car inspector, and I examined the cars Moore was attempting to uncouple at the time of his injury, the two eastermost cars after the car had been cut off by Berkhardt. They were coupled together on the east end of the cut and connected with the rest of the cars. On 54069 was a two-piece lever you push down on. There is another type where you pull up. As to whether there was slack between the two cars, I didn't examine them or touch them. I saw nothing defective. I never saw the lever after that time. The safe way of operating this kind of a lever, the way I use it, is to stand on the stirrup and push down with the other foot, holding on to the side of the car. The speed at the time of the accident was six or eight miles an hour, and the various signals were correctly interpreted by the engineer. These cars were empty.

Cross Examination.

Plaintiff's Exhibit 14 was the correct list of cars on Track 2, checking them from east to west, when I pulled them out. There were 21 cars on the track. I couldn't say whether I got the most easterly car, 38740, which was a set back. It was not going to the new shop. The next car C. & O. 20231 was going to the new shop, and the next car 58038 was on o. k. car. Berkhardt cut the first car off on to the new shop, and Moore was to cut the next car, C. & O. 58038, off to go on No. 13. Moore was handling the lever on the east end of 54069, the fourth car from the top of the list on Plaintiff's Exhibit 14. Moore was on the south, I on the north side of the train. The lever on 54069 was a push-down type lever on the south side of the train. I operate these with my feet, and while moving stand on the car with one foot and press down the other, which is safer than running along the ground and pushing down with the hand. A lever that went about a foot from the top of the rail I would call
92 a low lift lever. I saw Plaintiff's Exhibit 39 before. The signature exhibited to me is mine. I recall the attorney (Mr. Davidson) coming with Moore to my home to investigate the accident, although I don't recall his name. It is in the statement that "I observed that the lever on the third car that Moore was working with was too low." You've got it down and I guess that's what I told you, and it as true. I don't remember saying that I observed this

lever was low. Outside of that, everything else in the statement is correct as far as I know. I would not say that I didn't say it and don't remember whether I said it that night. I do not know that the lever was too low. (Witness was shown picture) When I went back to look at it, it didn't look that low and was not any lower than other cars.

PLAINTIFF'S EXHIBIT 39 as admitted and read in evidence and is as follows:

Statement.

Accident to Jim Moore Occupation Switchman
At Russell—Ky Date Nov. 29 1930 Hour about 6 A. M.
Statement of W. F. Conley
Made to Edward Davidson On the 5th
Day of January 1931. In the presence of J. Moore

My Name is W. F. Conley, Age 54 Years I reside at Kenova—West Virginia I am a Conductor—C. & O. Ry. by occupation. Am unmarried or married Married At time of casuality I was (state location and how engaged) Lining up switches. I was conductor of the crew. My crew was switching out a cut of 21 cars from the shop track No. 2. Burkhardt cut off the first car onto track 20 for that car to go to New Shops at Raceland—Ky. Moore was to cut off the second car, a Hopper car, onto track 13, and he had to use the lever of the third car in order to uncouple the
93 second car. I next heard Moore hollering and turned around and saw Burkhardt give a stop signal to stop the cut. The train stopped and I went down to where Moore was standing on the south side of train—being held by Burkhart. Moore was then about three car lengths from the easterly end of the cut. The engine and cars were then shoved into the clear and Moore taken by the engine to shop track steps. The car that Moore got hurt with had a red tag on the car, to go to the New Shops at Raceland. We were switching out this cut of cars to place the cars on the tracks they were to go to and also for the purpose of placing more cars from track 18 onto the Shop track, which we would have done upon completion of the switching out of this suit. I observed that the lever of the third car that Moore was working with was too low. I mean the lever of the third car on the east end of it. It was dark at the time. I have read

this statement and it is true to the best of my knowledge, and is exactly as I told it.

W. F. CONLEY

The court adjourned to April 29, 1931.

94 C. R. CALLAHAN:

Direct Examination.

I am assistant to the terminal train master of The Chesapeake and Ohio Railway Company at Russell, Kentucky. The railway company has a large assembly yard known as classification and terminal yards and shops at Russell. Empty coal cars are carried into Russell for breaking up and assembly. They have no destination other than Russell. These trains, after inspection, are broken up to switch out any cars that might be shopped by the inspector. Cars in condition for road service are classified in various yard tracks set aside for that purpose and lined up in cuts preparatory to leaving. At the time they are classified on these various yard tracks it is not known where they will be sent to. There are coal mines on the line of the C. & O. in Kentucky on what is known as the Big Sandy Subdivision. It is wholly within the State of Kentucky. Other coal fields are located on the lines of the C. & O. in West Virginia. Empty coal cars coming into Russell are also used for various other loading, quite a few for the loading of ties at the American Creosote Plant at Russell. The American Rolling Mill Corporation at Ashland, Kentucky uses coal cars for loading steel products and the Sennet Solvay Company at Ashland, Kentucky is a cake plant. The chief yard master assembles the cars into trains and the chief car distributor decides where the trains will go. Until such time as these trains leave Russell no one has any information as to whether they will go in or out of the State of Kentucky. When cars being switched off the light repair tracks and classified as good order cars, set backs and cars for shops, it is not known whether the good order cars will go into trains which will go to West Virginia or Kentucky, or whether they will go to Ashland to be loaded with steel products or coke.

95 Both the shops and the light repair tracks are inside the general limits of the yard.

I learned of Moore's accident about 7:30 A. M. on the morning it occurred. I saw the car involved in the accident between 12:45 and 1:30 P. M. Plaintiff's exhibit 15 looks like the car. I took pictures of it around 12:45 or 1:00 o'clock that day, being those marked defendant's exhibits 9 and 10.

Preliminary Questions by Plaintiff.

Plaintiff's exhibit 15 was made about thirty minutes after I took my pictures. I understand our company had it taken. The man who took it arrived while I was finishing. His name was Jimenez. The pictures I took were of the east end of the car. (DEFENDANT'S EXHIBITS 9 and 10 were then admitted).

Direct Examination Continued.

The pictures I took were of car 54069. When we went to get it there were two cars on the west end of the east bound repair track. We had the switch crew take the cars down six or seven hundred feet in order to photograph them. We backed up the westward car, 54069, and pulled it west on the lead in order to take the picture and returned it to the repair track before the other picture was taken. Conductor J. G. Ricks in charge of the west crew was on short time when I told this gentleman we could not hold these cars on the lead an longer. (Defendant's exhibits 11 and 12 are also pictures of the same car.) The lever which operates the coupler on this car is known as the push-down lever. When you push down on the handle it raises the pin and block lift which locks the coupler together. The lock block is down in defendant's exhibit 12 and up in defendant's exhibit 11. These two pictures were taken while the car was in the same position as in plaintiff's exhibit 15. (DEFENDANT'S EX-
96 HIBITS 11 and 12 were admitted in evidence). When the lever is pushed down the lock block in the coupler and much larger than the hole comes against the top of the coupler so that it is impossible to lower the end of the coupler further. The up and down movement of the lock block inside the coupler is about four inches. In defendant's exhibit 9 the lock block is up and the handle of the lever down. In defendant's exhibit 10 the lock block is down and the handle of the lever in the up position. I can explain why the lever appears nearer the rail in plaintiff's exhibit 15 than

in other pictures. As the elevation of camera is raised, an object between the camera and some other object appears lower with reference to the other object. When I took the pictures I pushed down the lever and it raised the lock block. The downward movement was arrested and was normal. I pushed it down four inches and it came to a stop, so that I couldn't push it any further. I tried it twice. In doing this it was not necessary to go between the cars, no part of my body other than my hand or wrist being between them. The lift lever in its down position was about twenty inches above the top of the rail although I did not measure it. The photographer who came while I was taken my pictures had a camera and a tripod.

Cross-Examination.

We had one light repair yard and one heavy repair yard, the light repair yard being on the west end of the east bound yard and we have one on the other side too. They have no top over them and they are located at Russell, Kentucky. Number two track is one of those tracks and is used for the making of light running repairs. Russell, Kentucky is a division point. Inspectors examine all cars in trains that come in there and repairs required are noted and the car taken out and put on the light empty repair track. These tracks are numbered 1 to 5 inclusive, including number two.

97 M. E. Collins is general foreman of that department.

Cars requiring a paint job are ordinarily sent to the new car shops though the proper officer may operate the car further. If it must be repainted then and there, they would take it to the new car shops, which are at Raceland, Kentucky, there being no other place for painting at Russell. I have seen cars coming in from other division points like Parsons Yard, Columbus, going to the new shops. Heavy repairs are made at the new car shop. C. V. Ratcliffe is the superintendent in charge of the new shop at Raceland, Kentucky. Seniority prevails in Moore's branch of the work. The company has a pension system but I do not know whether yard brakemen are pensioned. If a car comes in from Parsons Yard consigned to Raceland shops to C. V. Ratcliffe it isn't delivered when it is on repair track two or until it is delivered to the shop there. When V&O 33555 and HV 21342 were on that track 2 in the Russell yard consigned

from Columbus to C. V. Ratcliffe, those cars would not be delivered to destination until they had arrived at that shop at Raceland. The man on my pictures is operating the lever with his left hand. As to whether they operate levers with their feet is up to the man who is performing the service. Defendant's exhibits 12 and 11 and plaintiff's exhibit 15 were, I think, taken by the same man. I don't think the stop on plaintiff's exhibit 15 is bent. It isn't straight. It is made that way. It is curved. The stop in plaintiff's exhibit 15 is more clear than in 11 and 12. It is a little dark in the pictures I took. With the lever down as in defendant's exhibit 9, the inside arm of the lever is not up against the bottom of the stop. There is quite a bit of clearance between that arm and the bottom of the stop but not three or four inches. The stop is for safety. When the lock pin is pulled up it is arrested because the hole is not sufficient for it to go through. In event it would become disconnected, this safety appliance catches the inside arm. The arm isn't stopped by the stop but by the lock pin. I made no test of the car with another car to determine when the lever is pushed down the distance it has to be pushed down to
98 open the knuckle and release and effect an uncoupling. If the lever dropped two feet instead of four inches there would be something wrong with the lever but it couldn't drop two feet. This lever is not low. It is in front of the wheel. They all go in front of the wheel. The man's body is not between the cars when he is making an uncoupling and operating this lever. The lever is extended out in front of the wheel.

J. C. DODGION:

Direct Examination.

I am terminal trainmaster for the C. & O. at Russell, Kentucky and supervise the movements of the yard. I learned of Moore's accident about 7:30 or 8:00 o'clock on the morning of November 29 and saw the cars, C&O 54069 and C&O 58038, on December 1st, which was the following Monday, on number one repair track at the west end of the east bound yard. C&O 58038 was the easterly car. Conductor Ricks, Superintendent Butler and Assistant Road Foreman of Engines Milan were with me. Ricks took his crew, got the two cars out of number one repair track, brought them over to

the lead and made a drop of the cars to get them on the east end of the engine. The engine coupled onto them again and pulled them back on the lead with the engine heading east. The same car was still ahead. We gave the engine a signal to move the cars eastward and I cut the car off at the same point where the accident occurred. The engine was moving seven or eight miles an hour and I went to the side of the car and shoved down on the lever. When the engine reduced its speed the cars parted. I experienced no difficulty in effecting the uncoupling. The knuckles opened and the cars parted. I did not get my body between the cars in order to do it. I myself uncoupled them once only that morning. Conductor Ricks made two tests in the same manner and on each occasion the cars parted. I made my test first and the cars were coupled by impact without any one have to go between them to couple them. They were again coupled in the same manner after the conductor made his first test and he again uncoupled them. In making the
99 cuts I pushed the lever down four to five inches and it came to rest as the pin came up to release the coupler. There was a stop on the end sill. When the lever is shoved down the pin comes up to release the knuckle and at this point it lacks a fraction of getting up to the guard above the lever. The lock block has to be raised to the full limit that it can be raised inside the coupler in order to uncouple the car. If the stop was placed low enough so that it would arrest the upward movement of the lever before the movement had been arrested by the lock block going up, it would not be possible to uncouple the cars. As long as the lever is connected to the lock block the stop serves no purpose. In the event it becomes disconnected it would keep the lever from going further down. The only inspection which I made was in cutting the cars but I saw nothing defective about the lever or uncoupling apparatus.

Cross-Examination.

I operated the lever with my hand and not with my feet. They operate them just as much with their feet as with their hands. When I pushed down on the lever and the coupling was made the stop of the inside arm came up near the bottom of the stop something like a quarter inch. (Witness was shown picture) I don't think that is the picture of the car. This lever is lower than the lever I tested. My ex-

amination and test was made on Monday, two days after the accident, and the lever I examined on Monday does not look like the lever in that picture. The car on which I operated the lever was 54069. The lever in plaintiff's exhibit number 15 does not look like the lift lever. It is too low. The lever in defendant's exhibit 11 and 12 looks more like it. Examining all three of the pictures they look like the same car.

Recross Examination.

The lever in plaintiff's exhibit 15 is lower than the lever I tested out and is lower than it should be in the picture.

Redirect Examination.

I mean that it appears lower in the picture.

100 JOHN RICKS:

Direct Examination.

I am a yard conductor, employed by the C. & O. in the west end of the east bound yard at Russell, Kentucky, and have been railroading forty years. On or about the first day of December, 1930, I was told to get the cars that were involved in the accident suffered by Mr. Moore and make a test. I found them on No. 1 shop track. The cars were by themselves and coupled together. We backed in and got them out on the lead and took them down through the cross-over on to what they call the new lead where Mr. Moore was injured. We made two running tests of the car; backed down a little piece, and gave the cars a kick. Dodgion made the first test, backed a little piece with the cars and gave them a kick with the engine. As the cars came by he reached down and shoved down on the lever and separated the cars. I did not see him experience any difficulty in uncoupling them. I then coupled on to the cars, pulled them down west and made a test myself. As they came by at eight or ten miles an hour, I took hold of the grab iron on the lead car with my right hand and shoved the lever down with the other hand about four inches. The cars then separated. I made another test, the same identical way, and experienced no difficulty in effecting the uncoupling. It was not necessary

to put my body between the cars. I put my right hand on the grab iron so I could get solid and keep from falling between the cars. That is the way I always done. I have often seen a man uncouple cars with this type of coupler by standing on the stirrup. If they are running slow, I can stand on the ground and cut them. If they are running any ways near fast I stand on the stirrup, take hold of the grab iron and shove down on the lever and cut the cars. After I pushed the lever down I would say it was twenty inches from the rail, which is the customary distance. Some levers are a little bit higher than others. The car in Plaintiff's Exhibit 15 and Defendant's Exhibits 11 and 12 looks like the car.
101 The lever in Exhibit 15 appears lower than the one I handled that morning. It looks lower in the picture; it don't travel that far. The lever comprises two pieces of approximately the same length. When you push down on the outer lever a piece of that lever goes beyond where it is attached to the car, pries up on the other lever and raises the lock pin. The inner lever can be raised in that manner not over 3½ to 4 inches. A safety lock on top keeps it from being raised farther. The lock pin in the draw head, that is as far as that can travel. When the lock pin goes to the inside of the top of the coupler the car separates and that is as far as it can go. The inner lever does not come in contact with the safety stop so long as the lock pin does not come out of the coupler. If the safety stop arrested the upward movement of the inside lever before the lock block caught against the top of the inside of the coupling, it wouldn't allow it to travel far enough to get it uncoupled. It looks in the picture like the lever was lower than it appeared that morning. The others look more real.

Cross Examination.

In the normal and ordinary operation of the lever no part of the brakeman's arm goes in between the cars. I made the test on the Monday two days after the accident. No repairs were made to the car between the day of the accident and Monday that I know of. A man might knock a stop down with a couple of taps of a hammer. He could not very well straighten the bend out of the lever by giving it a couple of heaves. The lever in Plaintiff's Exhibit 15 was low, or looks low. On Plaintiff's Exhibit it is lower. When I took hold of the lever on Monday, the handle was two or

three inches below the end sill. Defendant's Exhibit 12 looks more like it. When I got hold of the lever it was two and a half or three inches below the end sill; I shoved down three or four inches and the car cut off. On that picture it looks lower. I don't know how far it is from the center of the wheel to the top of the rail.

102 *Redirect Examination.*

I am unable to tell from a photograph taken at an angle how high or how low the lever is.

JOHN ROBBINS:

Direct Examination.

I saw the cars which Moore was attempting to uncouple at 9:00 o'clock in the morning on the day of the injury. They were not then coupled together. M. E. Collins, general car foreman at the yards, and Mr. Ward, general car inspector of the C. & O., were with me. I saw no tool marks on any of the nuts which attached the coupling apparatus to the car, and saw nothing that indicate any change had been made. The exposed nuts and ends of the bolts were rusted to some extent. The cars were 58938 to the east, and 54069, standing about five or six feet apart on a curve with the north side of the track a little higher than the south side. I worked the lever up and down and experienced no difficulty. The handle went down three and a half or four inches; the downward movement was stopped by the lock in the coupler. The lock block works inside the coupler and has a space of three and a half to four inches to work up and down to release the knuckle. It is connected to the lever with a lock lift with a hole or eye in the top, through which the lever runs. The lock lift enters the coupler proper through a slot in the top of the coupler about one and a quarter inches wide and two inches long. The slot is a little larger than the lock lift which connects with the lock block which is two inches thick, two and a half inches wide and four or five inches long and larger than the hole in the top of the coupler through which the lock lift travels. The lever is in two pieces, both about the same length, and both attached to the car at the same place by a trunnion. The trunnion is attached to the end sill. The outer lever extends about eight

inches beyond the point where it is attached to the trunnion, the other part of the lever fitting over it so that when you push down on the outer lever it turns on the trunnion and the end which extends inside the trunnion lifts up on
103 the inner lever. The inner lever can be lifted about three and a half to four inches, and has to be lifted to the full limit of its travel in order to uncouple the cars. The upper part of the lock block comes to rest against the inside of the top of the coupler and then permits the cars to uncouple. So long as the lever is attached to the lock lift and the lock block the lever does not come in contact with the stop, there being about a quarter of an inch clearance. The bend in the stop is the way it is made. At the time of our inspection the outer lever was slightly bent at the eye, the bend being of a transverse character. The bend did not have the effect of lowering the end of the lever lower than it otherwise would have been, and did not in any way interfere with the operation of the coupler or render it unsafe in any particular. On the occasion of our inspection we measured the lever to see how close it came to the rail, using a board for a straight edge laid across one rail to the other. We pushed the lever down as far as it would go and measured from the end of the lever to the bottom of the board. I was holding the lever and bearing down just slightly. The measurement from the end of the lever to the top of the rail was eighteen and a half inches. I had pushed it down as far as it would go. Its travel was about three and a half inches. The other men also operated it. I saw Mr. Callahan and a photographer from Ashland later on taking pictures. Plaintiff's Exhibit 15 and Defendant's Exhibit 11 and 12 look like the pictures. I was present when the photographer from Ashland took his pictures. He took one about four or five feet from the car with his camera down at an angle towards the end of the car. The camera was on a tri-pod and in the first picture was setting between No. 1 and 2 repair tracks. The camera was higher than the lever in all of the pictures. On April 11, in the presence of Collins, Radcliffe, Wysong and Ward, other measurements were made. The car was on a track at the Russell car shop. A straight edge and spirit level were used to
104 ascertain whether the track was level. At the west end of the car the rail on the north side was an eighth of an inch lower than the rail on the south side. At the east end the rail on the south side was one-eighth of an inch lower than the rail on the north side. We used a straight edge and

measured from the end of the lever to the bottom of the straight edge that was on the two rails. The car, lever and uncoupling apparatus was in the same condition as I found it on the day of the accident. From the bottom of the lever to the bottom of the straight edge measured nineteen inches. Ratcliffe was holding the lever down. The track was approximately level. When the measurement is taken on a curve one side of the track is elevated which would make a difference in the measurement because the one is tilted slightly toward the inside of the curve. The car rests on side bearings on each end of the truck bolster and body bolster, and when it is tilted rests on the side bearings on the side toward which it is tilted. This makes some slight difference. When making our last measurements the travel in the lever from its position with the lock blown down and up was four inches. With the lock block raised the clearance between the inside lever and the stop was one-fourth inch. The lock block was then raised to the top of the coupling. Cars coming into the Russell shops, Russell yards, from Parsons, Ohio, or other points east, bearing cards known as the BF 4 card, would not go immediately to the Russell shops. This would depend on the amount of work they had in the shops.

Cross-Examination.

The drop of the lever was four inches on April 11, and on the first occasion three and a half inches. I was bearing down slightly on the lever in the first measurement. Ratcliffe put all his weight on it in the second measurements.

Q. You tell the jury the position of that lever when you took hold of it with reference to the end sill; how far below the bottom of the end sill was the handle of the lever at the time you took hold of it at the first occasion you handled it?

A. Seven or eight inches below the bottom of the end sill.

105 Q. The handle of the lever was seven or eight inches below the bottom of the end sill, is that right?

A. Approximately, yes.

Q. You took hold of that lever and shoved down on it?

A. Yes sir.

Q. You say it traveled four more inches maximum?

A. Yes sir.

Q. So that when the lever came to rest it came to rest approximately twelve inches below the bottom of the end sill?

A. I didn't measure it below the bottom of the end sill.

Q. You said you took hold of the lever when it was seven or eight inches below the bottom of the end sill, isn't that right?

A. Something like that.

Q. And then you say the drop of the handle of the lever was four inches?

A. Yes.

Q. That made a maximum of twelve inches the position the handle was below the bottom of the end sill when it came to rest, isn't that right?

A. Yes sir.

The lever in the picture, Plaintiff's Exhibit 15, was not below the bottom of the axle or below or about the center of the wheel when I saw it. The picture was taken at an angle. The handle end of the lever is not twelve inches below the bottom of the end sill. The picture, Plaintiff's Exhibit 15, shows it lower. In April when the lever dropped four inches, the inside arm came to a stop about a quarter of an inch below the stop. The picture shows about a half inch below the stop. It was a quarter of an inch when I tested it with a man holding down the lever. The car was on Track No. 1 when I made the first test a few hours after the accident at about 9:00 a. m. with Ward and Collins. No repairs were made to the car after the accident. I was on that repair track every day. I was not at all times watching that 106 car. The stop could be lowered in about five minutes.

There was a slight bend in the arm. It was not supposed to be there but was not defective as long as it operated. If the bend is not enough to make the lever unsafe it is maintained on our railroad. There is no more bend in the lever in Plaintiff's Exhibit 15 than in Defendant's Exhibit 12.

Redirect Examination.

The pictures were all taken at the same time and there was no change in the lever between the time the first and last pictures were taken as far as the bend is concerned. A lot of cars have a slight bend in the lever at this point. This bend did not interfere in any way with the operation of this lever or render it unsafe.

Recross Examination.

I think the handle of the lever was in the same position below the end sill when Moore handled it as when I handled it, but I don't know.

Redirect Examination.

My inspection was made before the pictures were taken and on the morning of the accident.

107 L. S. WARD:

Direct Examination.

I am general car inspector of the C. & O. Railway Company and reside at Ashland, Kentucky. I had occasion to be at Russell on November 29, 1930, and saw the cars 58038 and 54069 on No. 1 shop track. They were eight or ten feet apart. 58038 was to the east. It was supplied with the Carmer, or push down type of uncoupling device. I think the lock block was down. I operated the lift lever without difficulty by pushing it down as far as the lock block would come up and released the knuckle. The end of the outer lever moved downward about four inches. Plaintiff's Exhibit 15 does not show a true condition of the lever. I would think it was the same car. The lock block drops down and catches the lip of the knuckle and holds it in place and can not be released as long as the lock block remains down. You bear down on the cut lever, raising the locking block and releasing the knuckle. Both levers work on a trunnion or pivot attached to the end sill. When the lift lever is pressed down it raises the inner lever which is connected to the lock block with a rod or lift that runs down and connects the locking block and comes up through the coupler. The lever runs through that. The upward movement of the lock block is arrested when it comes to the top of the inside of the coupler, the lock block being larger than the hole through which the lift runs. Without something broken, it can only be raised from three to four inches. There is a stop which is bent upwardly and then down. This was its original shape. The inner lever, as I remember it, was under the high point of the stop. The stop has no effect unless the lever breaks or

something gives away. There is an additional device to keep the inner lever from going higher or over in case the connection between the lock block and lever is broken. Across the end sill is a flange and the shape of this (the lever) comes out above the flange so as to clear it and for that reason
108 is made in that shape. M. E. Collins and Robbins were with me when I saw the car on November 29. There were bends in the lever at that time. It had a number of bends up and down and sidewise too. The bend about middleway in the lever on Plaintiff's Exhibit 15 was fabrictaed in the lever when it was made, a sidewise bend. There are also perpendicular bends. There are different designs and shapes of these push-down levers to suit the design of the car or the end sill they work on. The bend in the lever at the eye was not originally constructed in it, but got there in some other manner. It is a lateral bend and did not in any way interfere with the operation of the coupler or lever. It did not in any way render the lever unsafe. The car was on a curve, the north rail being higher. The measurements were taken from the top of the rail to the end of the uncoupling lever by use of a straight edge laid across the rail, the measurement being from the bottom edge of the straight edge to the bottom edge of the cut lever. Robbins was holding the lever. The measurement was 18¼ inches. The car being on a curve would make a slight difference in the measurement, the side bearing clearance being taken up on the side which is leaning up the low side. It was 32¾ inches from the center line of the rail to the center line of the coupler. A subsequent inspection was made on April 11 of this year at the Russell car shops in the presence of Collins, Robbins, Ratcliffe, Wysong and myself. The track was measured and found an eighth of an inch lower on the north side at the west end and at the east end the opposite. A coupler was on the east end. The measurements were taken in the same manner as before, Ratcliffe bearing his weight on the lever. The distance between the end of the handle of the lever and the top of the rail was nineteen inches. The travel of the lift of the locking block was four inches and with the lever down the inner lever lacked possibly a quarter of an inch of touching the stop, but with Ratcliffe on it, it was practically
109 against the stop. The appliance handed me is the Carmer release, and the same lever I saw on the car which I inspected. The trunnion is riveted to the end sill. The lever with the round rod bent at the end is the part that goes

through the lift which fits about seven or eight inches from the end. The other lever is the outer lever. The stop is bolted on or riveted to the end sill. This stop is in the shape in which it was originally constructed. The piece of metal with a hole in one end and a pivot on the other is the lift that lifts the locking block. The up and down bend in the outer portion of the lift lever was originally constructed in it. The transverse bend between there and the other end was likewise originally constructed in it. The other at the eye was not. This bend has no effect in the way of interfering with the use of the lever in the uncoupling of cars, and has no effect upon the safety to the man engaged in the operation of the lever.

Cross-Examination.

The end sill is on the end of the car. A new wheel is 33 inches in diameter, a maximum variation being a half or three-quarter inch. The bottom of the axle is approximately 13 or 13½ inches from the top of the rail. In usual and ordinary operation the lever is not supposed to descend as low as the bottom of the axle and not lower than 18 inches from the top of the rail. If it did, it did something it should not have done. It is possible to bend a lever down so that it will be lower than 18 inches from the top of the rail. If it is bent enough or straight down it could go as low as a foot from the top of the rail. I know this is the lever that came off car 54069 and is the same lever that was on there between 9:00 and 9:30 on November 29. The lever was taken off the car April 11th. I didn't measure the drop of the handle of the lever on that day because I thought the only necessary thing was the height of the end of the lever from the rail which we have a specified distance on in the law. No. 1 track is used for other purposes than repairs, setting in cars for any purpose that we wish to have it there for. It is used for repairs more than anything else. When I examined the 110 lever and it came within 18½ inches from the top of the rail, the inside arm was under the stop. On the 29th, there was within a quarter of an inch of it, and on April 11 I think, a man's weight swinging on it, it went up practically against the top. The weight of a man would spring it that that extent. The stop is there to catch the lever in case something should fail in the lift or locking block so it would not fly over and hit the man operating it. When the lever went

up as far as the locking block would permit it to go it was brought right up close to the stop. The lever that I saw didn't drop down apparently as low as that in Plaintiff's Exhibit 15. I think this is from the elevation, the manner in which the picture was taken, possibly with the camera above it, and shows the lever lower than it was on the car. I can't tell from the picture whether it is lower than the one I operated. It looks lower. The top of the inside arm is possibly two inches or an inch and a half below the stop. There is clearance where the lever goes through the eye of the knuckle and the lock block of the car in Plaintiff's Exhibit 15 could go higher.

Redirect Examination.

I didn't see any pictures taken.

111 M. E. COLLINS:

Direct Examination.

I have been general car foreman of the C. & O. Railway Company at Russell, Kentucky for thirteen years and have been car repairer, gang foreman and assistant foreman. I saw the cars involved in the accident between 9:00 and 9:30 A. M. on the 29th. I understand that Moore was injured by C&O 54069. The other car which I saw was 58038. They were on the west end with number one repair track east bound yard. Ward and Robbins were with me. I inspected the coupler and levers and saw nothing whatever in the way of any dull markings or anything to indicate that any changes had been made. They were not coupled together, 54069 being to the west. The coupler on the east end of this car had a push type of lever known as the Carmer type. It is in two pieces, both of which fit on a rod attached to the end sill called a trunyan. The shove down levers are made in different patterns to fit whatever particular car they may be made for. They are made with bends both lateral and up and down so that they will be at the proper place on the car after they are fastened on. By using a straight edge across the rails, the lever pushed and held down by Robbins, the distance from the bottom of the lever to the top of the rail was 18½ inches. It was on a curve with the north rail

highest. Cars are built with a certain amount of side bearing clearance on each side so that they will rock. When it sets on a curve it leans toward the inner side, which somewhat affects the distance between the end of the lever and the top of the rail. The side bearing clearance for a car this type is some 3/16 to a quarter of an inch on each side and in leaning on the inside of the curve the springs would be depressed possibly an eighth of an inch. I opened the knuckles and closed it several times and experienced no difficulty whatever in operating the lever. From its position when the lock block was down to when it was fully pulled up, I pushed the lever down three and one-half to four inches.
112 It measured three and one-half inches at that time. Sometime about the month of February in the presence of Claim Agent Persinger and Mr. Wysong measurements were again taken on a level track at the Russell car shop. It was measured in the same way and found to be twenty inches. Robins was pressing down with his hand the first day and in February no one had hold of the lever. On April 11 in the presence of Ratcliffe, Ward, Robins, Wysong and myself further measurements were taken on a track at the Russel car shop. The distance from the end of the handle to the top of the rail with a straight edge across the rail and Ratcliffe holding the lever down was nineteen inches. The travel of the lever from its position with the lock block down to its position with the lock block up was four inches. (The parts of the lever were produced and it was admitted that the parts identified by the witness Ward were the particular articles he described them to be, such as the lever, the lock block and the various parts). I assisted in taking these off car 54069. The U-shaped piece is the stop and is attached to the same end sill as the trunion but toward the center. The lift pin fits on the inner end of the lever six inches from the inner end. It is approximately the same from this point to the trunion as from the trunion to the end of the lift lever. The distance to which the lift lever can be moved down is controlled by the travel of the lock lift which can go not over four inches. The lock lift goes through a hole in the top of the coupling and when attached to the lock block and contained in the coupler it limits the travel of the handle of the lift lever to approximately four inches. The function of the stop is not to arrest the upward movement of the inner lever when the pin is attached to the lock block. The couplers will be released before the lock block reaches the top of the inside

of the coupling. There was some clearance between the stop and the inner lever. The stop is made for protection
113 in case this breaks and so long as it doesn't break it serves no function. This is the same lever that was on car 54069 on the morning of November 29, 1930 and is in the same condition as it was then and at the time of the inspections in February and on April 11.

Cross-Examination.

I don't know the height from the bottom of the end sill of this car to the top of the rail. I didn't measure that. They do not all have a standard height. My best judgment as to this car would be around thirty-six inches from the bottom of the end sill to the top of the rail. The car was equipped with a 33-inch wheel. My best judgment is that it would be around three inches from the top of the wheel to the bottom of the end sill. On November 29 the drop of the handle of the lever measured 3½ inches. The next time I measured it, it went four inches. It was the same lever. It was pushed down, man holding the lever down; lift as high as it could go. The top of the inside arm was not resting up against the bottom of the inner bend of the stop. It was something like a quarter inch from it. In plaintiff's exhibit 15 it is possibly a little more than a quarter inch. It looks like it might be ⅜ of an inch. I don't know whether the bottom of the handle of the lever is below the center of the wheel. It looks to be in Exhibit 15. If it is below the center of the axle or wheel it is closer to the top of the rail than 16½ inches.

Redirect Examination.

Levers are inspected so as to give the inner lever a certain amount of play on account of the coupler working out and in. The draw head moves back and forth and it is necessary for the lever to travel with it. The stop is stationary with reference to the end still so that the particular point of the stop under which the lever might be at any particular time would depend to a very small amount on the location of the draw head as to whether it was out or in.

B. C. WYSONG:

Direct Examination.

114 I am chief car inspector of the C. & O. Railroad at the Russell car shops and keep a record of the cars which come to the Russel car shops. I have examined the records and cars C&O 33555 and HV 21342 have never come to or been in the Russell car shops since November 27, 1930. It takes about three hours to replace a cracked broken end sill in the shops. In the course of our work on November 27, 28 and 29, 1930 a car entering the shop would be ready to leave in about eight days. I was present in February when car C&O 54069 was inspected at the Russell shops. Persinger and Collins were present, the inspection being made at Persinger's request. I lifted the lock block by pushing down on the lever and experienced no difficulty in operating the lever. The lock block stops against the head inside. I pushed it down until the lock block came to the head of the coupler. We laid a straight edge across the track and measured from the bottom of the straight edge to the lower part of the lever. Nobody was holding the lever. The measurement was twenty inches with the coupler open and the lever pushed down as far as it would go. The travel of the lever was found to be four inches. I was also present on April 11, 1931 with Ratcliffe, Ward, Collins and Robins. We measured the track which was one-eighth inch lower on the south side at the east end of the car and one-eighth inch lower on the north side at the west end. This would be called a level track. With Ratcliffe pressing down on the lever with his weight on it the distance from the bottom of the straight edge to the lower part of the lever was nineteen inches. The parts present in court comprise the trunion, two levers, stop, lock, pin, lock block and lift of the coupling apparatus on car 54069 and they are in the same condition that they were in on the two occasions when I inspected and measured them. The lift lock is in the coupler, the lift pin is fastened onto it and enters the coupler through a hole in the top about an inch and a half in diameter and smaller than the lock block.

115 With the lock block and lift pin in place in the coupler the inner lever can be raised about four inches when it is stopped by the lock block coming in contact with the top of the inside of the coupler. The stop is bent but has no effect

on the operation of the coupler so long as the lock block is connected to the lever by the lift pin. The stop is to arrest the upward movement of the arm in the event it becomes disconnected from the block. The bend on the outer end of the lever was made when it was manufactured, as was the transverse bend between that and the eye. It has a small bend at the eye. This did not interfere at all with the operation of the lever and would not render the lever in any sense dangerous. I recall some pictures taken a day or two after the inspection in February by a Mr. Henley, an Assistant Claim Agent. The pictures marked defendant's exhibits 13 to 17 inclusive are pictures of that car as it appeared a day or two after the inspection in February, 1931. There was no change in the condition of the car between the time the pictures were taken and the time I made the inspection. (Exhibits 13 to 17 were each admitted in evidence.) They were taken with the camera at the same height above the rails as the lever.

Cross-Examination.

If the lever is so low in front of the center of the wheel it is dangerous. The Russell car shop is at Russell, Kentucky. The Russell car shop is the one Mr. Ratcliffe is superintendent or foreman of. It is a mile and a half west of Raceland, Kentucky and not at Russell. It would depend on how much of a break there was in a sill as to whether the car was to be operated without being first repaired. It would not have to be a serious break to be consigned to our shop for heavy repairs. We keep a record of cars which come into our shop for two or three hours. I couldn't say whether a car would leave in commerce with a broken sill unless I seen it.

116 CHARLES V. RATCLIFFE:

Direct Examination.

I am shop superintendent of the Russell car shop of the C. & O. railroad. On April 11, 1931, I inspected car C&O 54069 in the presence of Ward, Collins, Robbins and Wysong. I was holding the lift lever down, leaning over on it, and the measurement of the distance between the end of the lever and the top of the rail is 19 inches. It measured 23 inches

above the rail with the lock block down and the knuckles closed, or a travel of four inches. The parts lying on the table (in the court room) are the lever, trunnion, stop, lift pin, lock block and knuckle thrower that I examined that day. No other car was connected with it, but I pushed it down to open and close the knuckle and had no difficulty in doing this by means of the lever. It worked perfectly normal. The bend toward the outer end of the handle was originally there, as was the transverse bend between it and the eye. It was put there with a die used to manufacture. The bend at the eye came through use. It did not interfere with the operation of the knuckle in any way, and there was nothing about it to make it dangerous to any one. It would have passed federal inspection.

Cross-Examination.

I didn't make any test with that lever while the car was coupled to another car. The lever on the car I examined didn't extend down below the wheel. I don't know whether the lever in Plaintiff's Exhibit 15 is the lever I am talking about. My opinion is that it is the same lever, and it is due to the angle of the camera to cause that delusion.

117 ED F. PERRY:

Direct Examination.

I live at Fort Wayne, and have been a commercial photographer for forty years. I have seen the pictures marked Plaintiff's Exhibit 15 and Defendant's Exhibits 11 and 12 a short time ago. In taking a photograph which includes several objects, the height of one object with reference to the other, as it appears in the photograph, will depend upon the position of the camera. If the camera is higher, especially if a short-focus lense is used, it makes a thing recede down. If you put the camera down below and point it up toward the object it raises it up. The relative height of objects some distance apart and one behind the other can not be told by a photograph unless the camera is directly on a line with the object. In Plaintiff's Exhibit 15 the camera was between five feet and five feet four inches high, looking down, and about eight feet from the object with a short focus lense. In

Exhibits 11 and 12 the camera was lower—about four and one-half feet high, and back a little further than the first picture. This has the effect of making the same objects in the picture first shown me and in the pictures last shown me appear different with relation to the ground.

Cross-Examination.

I did not take the pictures. They are all right, and show up conditions from where it was made.

At this point the defendant rested its case.

Thereupon the plaintiff offered and introduced in rebuttal the testimony of the plaintiff James B. Moore whose testimony, on direct, cross and redirect examination, in condensed and narative form, was as follows:

JAMES B. MOORE:

Direct Examination.

118 The lever before me has been taken apart. The nuts have been taken off. It is not in the same condition now as it was the morning I handled it. It hasn't got the same bend in it and doesn't look like the same lever. The levers in defendant's exhibits 13 to 17 are not in the same condition as they were in on the morning I handled the lever of the car I got hurt with. In my opinion it is not the same lever or not in the same condition. The lever shown in exhibits 11 and 12 is not in the same condition as the lever I handled on the morning I got hurt.

Cross-Examination.

I only saw the lever on which I got hurt when I took hold of it with my left hand. I first saw four or five inches of the handle where I took hold. I saw the bend in the lever where it fastened to the lug while I was between the cars in the act of falling. I was there four or five or ten seconds and saw it by the light of my lantern which was in between the cars in my right hand. I had it opposite that lug when it overbalanced me. It was not resting on anything; the cars

were moving eight or ten miles an hour and I can say that it was a different lever from the lever exhibited in the court room by the defendant.

Redirect Examination.

I could recognize the lever in the condition it was in that morning if I saw it again on that car. I never seen one before that bad; never had hold of one that bad.

119 The plaintiff then rested.

And thereupon at the conclusion of all of the evidence in the case, after both plaintiff and defendant had finally rested, the defendant filed a written motion moving the court to direct the jury to return a verdict in favor of the defendant, which motion, omitting the caption and signature of counsel, was as follows:

The defendant at the close of all of the evidence hereby moves the court to direct the jury to return a verdict in favor of the defendant for each of the following reasons:

(1) The evidence is insufficient to establish the fact that the plaintiff was employed by the defendant in Interstate Commerce at the time of receiving the injury complained of.

(2) The evidence is insufficient to establish that the defendant violated the Act of Congress commonly known as the Safety Appliance Acts or any rules or orders lawfully promulgated thereunder by the United States Interstate Commerce Commission in any of the particulars charged in the complaint.

(3) The evidence is insufficient to etsablish the fact that any violation on the part of the defendant of any provision of the Act of Congress commonly known as the Safety Appliance Acts or any rules or orders lawfully promulgated thereunder by the United States Interstate Commerce Commission and declared upon in this action was the proximate cause of plaintiff's alleged injuries.

(4) The evidence is insufficient to show that the defendant was guilty of any act of negligence which was the proximate cause of plaintiff's alleged injuries.

(5) It affirmatively appears from the evidence that
120 the plaintiff assumed the risk of injury from the negligence of the defendant, which is complained of.

(6) The court is without jurisdiction over the cause of action declared upon in the second paragraph of complaint

for the reason that the same is a civil suit at law arising under a law of the United States known as the Safety Appliance Act and brought by original process or proceeding in a district other than that whereof the defendant is an inhabitant and the jurisdiction is not founded only on the fact that the action is alleged to be between citizens of different states.

This motion was overruled by the court, to which ruling the defendant at the time excepted. After the ruling on the foregoing motion and before the commencement of the argument of the case to the jury the defendant filed and tendered written instructions numbered from 1 to 6 inclusive and asked that they be given to the jury, which said instructions with the written request therefor, omitting therefrom caption and signature of counsel, are as follows:

The defendant hereby tenders to the court the following instructions numbered from 1 to 6 inclusive and asks that they be given to the jury as the law applicable to this case.

1.

There can be no recovery in this case on the first paragraph of the plaintiff's complaint and as to such paragraph your finding should be in favor of the defendant.

2.

There can be no recovery in this case on the second paragraph of the plaintiff's complaint and as to such paragraph your finding should be in favor of the defendant.

121 3.

The plaintiff cannot recover in this case, in any event, unless you find that he was employed by the defendant in Interstate Commerce at the time of receiving his alleged injuries. One who is engaged in switching empty cars in a railroad yard is not engaged in Interstate Commerce unless the cars in question have been assigned to be loaded with Interstate freight. Under such circumstances if it is not known whether the cars in question are to be loaded with Interstate freight or whether their next movement will be confined within the limits of the state, their movement in the yards is not a movement in Interstate Commerce and the employees who are moving them are not engaged therein.

4.

I instruct you that if the cars which plaintiff was endeavoring to uncouple were provided with couplers which would couple automatically by impact and which could be uncoupled without the necessity of men going between the ends of the cars, the defendant was not guilty of violating the Safety Appliance Act as charged in the complaint.

5.

It is generally conceded to be true that, however perfect an uncoupling apparatus may be, it will not work at all while there is a binding friction on the lifting pin. A failure of the pin to lift on the first effort or attempt is not sufficient evidence of any existing defect unless it appears that the effort was of a character and made at a time when it would have naturally been effective save for a defect.

122 *Penn. R. Co.* v. *Jones,* 300 Fed. 525.

6.

While the Act of Congress makes it unlawful for any common carrier, engaged in Interstate Commerce by railroad, to haul or permit to be hauled or used on its line any car used in moving Interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars, and pursuant to said Act, the Interstate Commerce Commission has made certain orders specifying the number, dimensions, location and manner of application of couplers and other appliances therein prescribed, yet I charge you that neither the language nor the purpose of the statute requires the equipment of cars with appliances that will operate with unfailing precision on every occasion. Such a degree of perfection is not essential to the safety of the employe, for whose protection the equipment is required. It may be expected from the very construction of such devices that in the course of time, and under the unavoidable varying conditions incident to the railway traffic there will be occasions when more than one impact may be required in order to effect a coupling or when more than one attempt will be required in order to effect an uncoupling. A railroad company cannot be held to have violated the statute until the inefficiency

of the device has been disclosed by some reasonable test that would justify hte conclusion that it was defective.

St. L. SW Ry. Co. v. *Bounds,* 244 SW 1099.

The court refused to give any of the instructions so tendered but gave to the jury the following charge:

123 "Gentlemen of the jury, the plaintiff, James B. Moore, sues the defendant, Chesapeake & Ohio Railway Company, a corporation. His complaint is in two paragraphs. To each of these paragraphs the defendant has filed a denial, which puts the burden of proving the material allegations of his complaint on the plaintiff. The plaintiff assumes at the outset of this trial the burden of satisfying your minds by a fair preponderance of the evidence that the material allegations of his complaint are true. In his complaint he charges that the defendant was negligent in several ways and that his injury was the proximate result of that negligence. He charges that the defendant used and permitted to be used on its railroad a car equipped with a push-down type of uncoupling lever, the handle of which lever when operated in the ordinary, usual and normal way descended to a point less than eighteen inches from or above the top of the rail without causing or engaging the lock block or pin to release the knuckle in the coupler. He also charges that the defendant used the same push-down type of uncoupling lever and handle of the lever which when operated in the usual, ordinary and normal way dropped fifteen inches over all. He further alleges that several parts of the coupler in quetsion were twisted and bent and unsafe for use and that he was injured as the direct or proximate result or because of the condition of that coupler. The first count or the first paragraph of the complaint is based on what we call the Safety Appliance Act. The second count or the second paragraph of the complaint is based upon the statutes of the State of Kentucky.

Under the first paragraph of the complaint if you find
124 there was a violation of the Safety Appliance Act and that the plaintiff and defendant were engaged in interstate commerce and that the plaintiff's injury was the proximate result of the violation of the Safety Appliance Act the plaintiff would be entitled to recover. That is under the first count. Under the second count if you find the defendant violated the statute of Kentucky, which I will define for you in a few moments, you must, in addition, find that there existed, at the time of the bringing of this law suit, a diversity of citizenship; that the defendant, as alleged in the com-

plaint, was a citizen of the State of Virginia and that is admitted in this case. You must further find that the plaintiff, at the time of the bringing of this suit and at the time of the trial was a citizen of the State of Indiana. I think he alleges, at least it appears in evidence, that he resides in the City of Fort Wayne, in Allen County, Indiana. If you find that he is a bona fide citizen of the State of Indiana and the defendant a citizen of the State of Virginia then a diversity of citizenship exists. The Federal Employers Liability Act provides that every defendant, and this defendant was, a common carrier while engaging in commerce between the several states, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, such interstate commerce, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees, or any of the officers or employees, or any defect due to its negligence in its cars, engines, etc. That is the Federal Employers Liability Act. The Act which we call the Federal Safety Appliance Act provides that it shall be unlawful for any common carrier to haul, permit to be hauled or used on its line any car used
125 in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of a man going between the ends of the cars. The Interstate Commerce Commission has provided certain rules and regulations and has provided the distance above the rail that interstate carriers shall be permitted to use couplers and uncouplers. The rule of the Interstate Commerce Commission provides that handles of uncoupling levers shall have a minimum drop of twelve inches, a maximum of fifteen inches over all, and that the handles of uncoupling levers of the rocking or push-down type shall be not less than eighteen inches from the top of the rail when the lock block has released the knuckle. So that if you find the defendant used, in the operation of its cars, an uncoupling lever of the push-down type, the handle of which was less than eighteen inches from the top of the rail when the lock block released the knuckle, that would be a violation of the Interstate Commerce rule and would make the defendant liable under the Safety Appliance Act for any injury resulting to an employee by reason of a coupler of that type. A coupler or uncoupler, to comply with the Safety Appliance Act, must be such that when operated in the manner in which it is intended to operate, will perform its func-

tion under all conditions under which couplings are made in railroad work; that is, a coupler or uncoupler is intended to be a practical part of the car equipment. Under the Safety Appliance Act and the first paragraph of this complaint there is no question for you to consider in reference to any assumption of risk on the part of the plaintiff, neither is there any question of contributory negligence, that is, whether or not the plaintiff contributed to his own injury.

Those questions are taken out of this case by the Federal
126 Acts which I have just quoted from to you. You must, however, find that the defendant was guilty of negligence, that is, that the defendant used an appliance that did not comply with the Federal Safety Appliance Act; and you must find in addition, under all the evidence, that the failure of the defendant to comply with the Safety Appliance Act was the cause of the plaintiff's injury. If he received his injury for some other reason than that the defendant violated the Safety Appliance Act then he could not recover. I have talked with you about the proximate cause. It is rather difficult to define proximate cause but I might say to you here that a proximate cause is an efficient, direct, dominant cause as distinguished from a remote cause, some cause remote from the injury. If it appears that the injury complained of in plaintiff's complaint was the result and probable consequence of the act of negligence complained of then you would be justified in finding that the negligent act was the proximate causes of the injury. There may be more than one proximate or dominant, direct cause of an injury or there may be more than only one proximate cause. The serious question in this case for you to consider is the question of whether or not the defendant violated the Safety Appliance Act, the uncoupling act, in that it did not have an uncoupling lever that complied with the Safety Appliance Act and the rules of the Interstate Commerce Commission with reference to the height above the rail and the maximum movement of the handle of the uncoupling device. If you find the defendant did violate that rule or a provision of the Safety Appliance Act and the plaintiff's injury was the proximate result of such violation then the plaintiff is entitled to recover in this case. In determining this question and all other ques-

tions and the preponderance of the evidence you are the
127 exclusive judges of the weight to be given the testimony.

It is not the number of witnesses as to a particular issue that necessarily forms a preponderance or makes a pre-

ponderance; it is the evidence that impresses you as ringing true, the evidence which you believe. It is your duty to pass upon the credibility of the witnesses who have testified before you in this case. You have a right, in passing upon that credibility and in determining what credence to give the testimony, to consider the demeanor of the witnesses on the stand; their appearance as they testified; their apparent willingness or unwillingness to give testimony in this case; the reasonableness or unreasonableness of the stories they relate; whether you believe the story they tell; the knowledge which the witnesses had concerning the facts about which they gave testimony and the interest that any of the witnesses may have in the result of your verdict, the result of this lawsuit which may or may not have influenced or biased their testimony. You have a right to take all these matters into consideration. Weigh them all carefully, then give credit where you think credit should be given. If your verdict is for the plaintiff it will be necessary for you to determine the amount of his damages. This you must determine from the evidence in the case. You are not to be moved by sympathy, although we all have sympathy for injured persons. You are to try this case and arrive at a verdict exactly as if it were between two individuals. You have a right to take into consideration the actual loss the plaintiff has suffered under the complaint in this case, his loss of earning power, his loss of ability to earn money, all the pain and suffering that he has endured up to the present time and all the
128 pain and suffering that is to be reasonably expected he will endure in the future, the humiliation and disfigurement and all medical attention he has been required to obtain for himself up to the present time and any and all medical attention that will be required in the future. It is your privilege and duty, if your verdict is for the plaintiff, to render unto him just, fair and full compensation for his injuries.

When you retire you may select your own foreman. We will send to you the exhibits in the case, such exhibits as the counsel feel they desire sent, or such as the jury may desire, and the pleadings in the case, the complaint and answer, and two forms of verdict that I have prepared. One reads: 'We, the jury, find for the defendant,' in case your verdict is for the defendant and against the plaintiff, you may use that short form of verdict and have your foreman sign it. The other is, 'We, the jury, find for the plaintiff and assess his damages at blank dollars.' In the even your

verdict is for the plaintiff it will be necessary for you to determine the amount of his damages, considering all the things I just suggested, under the evidence, and when you have arrived and agreed upon the amount cause your foreman to fill in that amount and sign it and return it to the Court."

At the conclusion of the foregoing charge the court asked: "Are there any exceptions or requests by counsel?" Thereupon in the presence of the jury and before they retired defendant's counsel said: "The defendant excepts to the refusal of each of the instructions tendered by it and further excepts to that portion of the Court's charge wherein the jury are told that they are entitled to award a recovery if the lever in question dropped more than fifteen inches over all, for the reason that there is no provision in the Safety Appliance Act, or any regulation promulgated thereto by the Interstate Commerce Commission which contains any 129 such requirements with reference to the lever as described in the complaint and also described in the evidence. We further request that the Court instruct the jury that there can be no recovery in this case because the lever was made more than four inches below the end sill, as referred to by counsel in his argument."

The Court then said: "State that request again." Deendant's counsel then said: "The defendant further requests the Court to instruct the jury that there can be no recovery in this case because of the location of any lever more than four inches below the end sill, as referred to by plaintiff's counsel in his closing argument, for the reason that no such act of negligence or violation of statute is charged in the complaint and for the further reason that that fact, if proved, would neither constitute negligence nor violation of the Safety Appliance Act or any rules pursuant thereto."

The Court then said: "I will adopt that instruction as requested. (Continuing charge to jury): There is no allegation in the complaint on that subject and therefore the plaintiff cannot recover for that reason even if you find it to be true, as Mr. Cole requested."

Thereupon the jury retired to consider their verdict and afterwards, to-wit: on the 30th day of April, 1930, the jury rendered a verdict for the plaintiff and against the defendant.

Thereupon the defendant by its counsel on the 11th day of May, 1931 filed a motion for a new trial in the words and figures following:

May 11. 130 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Indiana

Fort Wayne Division.

James B. Moore, *Plaintiff,*
vs.
The Chesapeake and Ohio Railway Company, a Corporation, *Defendant.* } At Law No. 402.

MOTION AND APPLICATION FOR A NEW TRIAL.

Comes now The Chesapeake and Ohio Railway Company, the defendant in the above entitled cause, and moves and applies to this court for an order setting aside the verdict herein and granting a new trial of the above entitled cause for each of the following reasons:

(1) The verdict is not sustained by sufficient evidence.

(2) The verdict is contrary to law.

(3) The damages assessed by the jury are excessive.

(4) The court erred in permitting the plaintiff, James B. Moore, when testifying on his own behalf on his examination in chief, on direct examination on the hearing of the second paragraph of defendant's plea in abatement to the jurisdiction of the court, to answer, over the objection of the plaintiff, the following question: "When, for the first time, did you make up your mind to leave for Ft. Wayne?" To which question the witness answered: "January 9, 1931." To which ruling of the court the defendant at the time excepted.

(5) The court erred in finding against the defendant on the second paragraph of its plea in abatement to the jurisdiction of the court which was addressed to the
131 second paragraph of plaintiff's complaint, to which ruling of the court the defendant at the time excepted.

(6) The court erred in permitting the plaintiff, James B.

Moore, while testifying on his own behalf, in chief on direct examination on the trial of said cause on its merits, to answer, over the objection of the defendant, the following question: "Now tell the jury what you observed on this car with reference to where this car came from, where it was going and what was done with it." To which question the witness made the following answer: "BF four form card and said on the card from Parson's Yard, C. F. Ehrman to Raceland Shops, broken center sill to C. B. Ratcliff." To which ruling of the court the defendant at the time excepted.

(7) he court erred in permitting the plaintiff, James B. Moore, while testifying on his own behalf, in chief on direct examination on the trial of said cause on the merits, to answer, over the objection of the defendant, the following question: "How much lower than the bottom of the axle did the lever of the handle descend?" To which question said witness made the following answer: "Two inches or more." To which ruling of the court the defendant at the time excepted.

(8) The court erred in permitting the witness Roland R. Schulz, while testifying on behalf of the plaintiff, in chief, on direct examination, to answer, over the objection of the defendant, the following question: "I will ask you to state to the jury what the law of Kentucky was in that respect in full force and effect on November 29, 1930, in the State of Kentucky?" To which question said witness made the following answer: "This was the law: That every common carrier by railroad while engaged in commerce in this State shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, to his or her personal
132 representative for such injury or death to such employee resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, docks, boats, wharves or other equipment. In all actions hereafter brought against such common carrier by railroad, or by virtue of any of the provisions of this Act to recover damages for personal injury to any employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable

to such employee; provided, that no such employee who may have been injured or killed shall be held to have been guilty of contributory negligence in any case where the violation of such common carrier of any statute, State or Federal, enacted for the safety of employees contributed to the injury or death of such employee. That in any action brought against any common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any employee, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute, State or Federal, enacted for the safety of employee, contributed to the injury or death of such employee," and in overruling defendant's motion to strike out said answer, to each of which rulings of the court, the defendant at the time excepted.

(9) The court erred in refusing to permit the witness John Robbins, while testifying as a witness for plaintiff, on cross-examination on plaintiff's case in chief, to answer the following question: "What was the practice at Russell with reference to cars which came there to be re-
133 paired at the shops from other divisions, as to whether these cars were frequently held on different repair tracks for a considerable period of time before finally reaching the shops?" To which ruling of the court the defendant at the time excepted.

(10) The court erred in refusing to permit the witness John Robbins, while testifying as a witness for plaintiff on cross-examination on plaintiff's case in chief, to answer the following question: "What is the fact as to whether cars which came from Parson's Yard under the direction of Mr. Ehrman, with the cards tacked on in the same form as Plaintiff's Exhibit 1, being form BF four, after arrival at the Russell Yards were from time to time sent out on the road to be loaded without ever going to the Russell Shops?" To which ruling of the court the defendant at the time excepted.

(11) The court erred in permitting the witness E. Berkhardt, while testifying as a witness for the defendant, to answer upon cross-examination, over the objection of the defendant, the following question: "And Mr. Moore said to you, the low lift lever was bent, went too low and unbalanced me?" To which question the witness answered: "He said a low lift lever." To which ruling of the court the defendant at the time excepted.

(12) The court erred in refusing to permit the witness John Robbins, while testifying on his direct examination as a witness on behalf of the defendant, to answer the following question: "What is the fact as to whether or not cars with those cards were from time to time inspected by men from the shops and sent out to road service without first going to the shops?" To which ruling of the court the defendant at the time excepted.

(13) The court erred in refusing to permit the witness L. S. Ward, while testifying on behalf of defendant on direct examination, to answer the following question:
134 "Did that bend have anything to do with making the handle of the lever higher or lower from the top of the rail?" To which ruling of the court the defendant at the time excepted.

(14) The court erred in refusing to give to the jury instruction numbered 1 of the instructions tendered by the defendant, to the refusal of which the defendant at the time, in the presence and prior to the retirement of the jury excepted.

(15) The court erred in refusing to give to the jury instruction numbered 2 of the instructions tendered by the defendant, to the refusal of which the defendant at the time, in the presence and prior to the retirement of the jury excepted.

(16) The court erred in refusing to give to the jury instruction numbered 3 of the instructions tendered by the defendant, to the refusal of which the defendant at the time, in the presence and prior to the retirement of the jury excepted.

(17) The court erred in refusing to give to the jury instruction numbered 4 of the instructions tendered by the defendant, to the refusal of which the defendant at the time, in the presence and prior to the retirement of the jury excepted.

(18) The court erred in refusing to give to the jury instruction numbered 5 of the instructions tendered by the defendant, to the refusal of which the defendant at the time, in the presence and prior to the retirement of the jury excepted.

(19) The court erred in refusing to give to the jury instruction numbered 6 of the instructions tendered by the defendant, to the refusal of which the defendant at the time, in the presence and prior to the retirement of the jury excepted.

(20) The court erred in instructing the jury to
135 the following effect: He (the plaintiff) also charges that the defendant used the same push-down type of uncoupling lever and handle of lever which when operated in the usual, normal and ordinary way dropped fifteen inches over all. . . The Interstate Commerce Commission has provided certain rules and regulations and has provided the distance above the rail that interstate carriers shall be permitted to use couplers and uncouplers. The rule of the Interstate Commerce Commission provides that handles of uncoupling levers shall have a minimum drop of twelve inches, a maximum of fifteen inches over all. . . The serious question in this case for you to consider is the question of whether or not the defendant violated the Safety Appliance Act, the uncoupling act, in that it did not have an uncoupling lever that complied with the Safety Appliance Act and the rules of the Interstate Commerce Commission with reference to the height above the rail and the maximum movement of the handle of the uncoupling device. If you find the defendant did violate that rule or a provision of the Safety Appliance Act and the plaintiff's injury was the proximate result of such violation, then the plaintiff is entitled to recover in this case. The defendant having at the time, in the presence and before the retirement of the jury, excepted to said portion of said charge, wherein the jury were told that they were entitled to award a recovery if the lever in question dropped more than fifteen inches over all.

Wherefore, defendant prays that the verdict be set aside and that a new trial be granted.

Dated this 11th day of May, 1931.

ALBERT H. COLE,
Attorney for Defendant.

136 I hereby allow the within motion and application to be filed in this cause.

Dated May 11th, 1931.

THOMAS W. SLICK,
District Judge.

137 That thereafter, to-wit: on the 16th day of January, 1932 said motion for a new trial was overruled and denied by the court, to which ruling counsel for the defendant there and then excepted.

Be it further remembered that the said deposition of John A. Robbins introduced as aforesaid was taken by the

plaintiff at Russell, Kentucky on the 2nd day of April, 1931, pursuant to notice duly served on the defendant; that the defendant appeared at the taking thereof by counsel, who, before the commencement of the same, stated that said defendant appeared at the taking of said deposition specially, only insofar as the evidence to be elicited thereby bore on the questions and issues tendered by the plea in abatement and to the judisdiction of the court theretofore filed by the defendant in said cause.

That the said depositions of J. G. Rayburn and C. F. Ehrman were taken by the plaintiff at Columbus, Ohio on April 15, 1931, pursuant to due notice thereof served upon the defendant by the plaintiff and that the defendant appeared at the taking thereof by counsel, but prior to the commencement of the same stated that the defendant appeared at the taking of such depositions specially only and insofar as the evidence adduced should be pertinent on the question as to the jurisdiction of the court over the subject matter of the action and over the cause of action and over the person of the defendant.

That the said deposition of Minta A. Moore was taken at Portsmouth, Ohio and the depositions of Ida Lewis and Lee Moore were taken at Ashland, Kentucky, by the defendant upon April 17, 1931, upon notice duly served by the defendant upon the plaintiff.

Be it further remembered that plaintiff's Exhibits Numbered 15 and 17, being a photograph of a car and an X-ray photograph respectively, Defendant's Exhibit 8, a blueprint, and Defendant's Exhibits 9, 10, 11, 12, 13, 14, 15, 16 and 17, being photographs, are not manually incorporated in
138 this bill of exceptions in order that they may be sent by the Clerk of the United States District Court for the Northern District of Indiana, direct to the United States Circuit Court of Appeals for the Seventh Circuit, to be received and considered by it in connection with the transcript and are hereby made a part of this bill by reference.

This was all the evidence in the case.

Forasmuch as the matters above set forth do not fully appear of record, the defendant tenders this, its bill of exceptions, and prays that the same may be signed and approved by the Judge of this court. Certificate of Judge.

Dated March 4th, 1932.

ALBERT H. COLE,
Attorney for Defendant.

The foregoing bill of exceptions was filed on the 4 day of March, 1932, at the December Term, 1931 of the District Court of the United States, for the Northern District of Indiana, Fort Wayne Division, the same term at which the judgment in the above entitled cause was entered and within the time allowed for the filing of this bill of exceptions. Said bill contains all the evidence given and proceedings had upon the triol of this action, and is in all respects correct, and is hereby approved, allowed, and settled, and made a part of the record herein.

Dated March 4, 1932.

THOS. W. SLICK
Julge District Court of the United States, for the Northern District of Indiana, Fort Wayne Division.

ed Mar. 4, 2. 140 * * (Caption) * * *

ORDER TO SEND UP ORIGINAL EXHIBITS.

A motion therefor having been made by Albert H. Cole, Attorney for the defendant, that the original papers hereinafter referred to should be transmitted to the United States Circuit Court of Appeals for the Seventh Circuit upon appeal of this cause and the Judge of this court being of the opinion that such papers should be transmitted,

It is therefore ordered that the following papers, to wit: Plaintiff's Exhibits Numbered 15 and 17, being a photograph of a car and an X-ray photograph respectively, and Defendant's Exhibit 8, a blueprint, and Defendant's Exhibits 9, 10, 11, 12, 13, 14, 15, 16 and 17, being photographs, all of which exhibits are referred to and described in the Bill of Exceptions herein, be transmitted by the Clerk of this court to the Clerk of said United States Circuit Court of Appeals to be received and considered by the court last named in connection with the transcript herein and returned to the Clerk of this court after the disposition of said appeal.

Dated: March 4, 1932.

THOS. W. SLICK,
District Judge.

139 And now the defendant files its stipulation in relation to certain physical exhibits, which stipulation reads in the words and figures following, to wit:

* * (Caption) * *

STIPULATION.

The parties to this cause by their respective counsel do hereby stipulate and agree as follows:

That plaintiff's Exhibits Numbers 15 and 17, being a photograph of a car and an X-ray photograph respectively, defendant's Exhibit Number 8, a blueprint, and defendant's Exhibits 9, 10, 11, 12, 13, 14, 15, 16 and 17, being photographs, be not manually incorporated in the Bill of Exceptions, but that they be sent by the Clerk of this court direct to the United States Circuit Court of Appeals for the Seventh Circuit in their original form.

This agreement is made in conformity with an order of the trial court by the presiding Judge that said Exhibits be not manually incorporated in the Bill of Exceptions but that they may be made a part of the Bill of Exceptions by reference and be sent by the Clerk of this Court to said United States Circuit Court of Appeals, as aforesaid.

TEETER AND HARTZLER,
Attorneys for Plaintiff.
ALBERT H. COLE
Attorney for Defendant.

And now the court enters its order that certain physical exhibits be sent by the Clerk of the court to the Circuit Court of Appeals, which order reads as follows, to wit:

141 And afterwards, to wit, on the 5th day of April, 1932, the following proceedings were had in the above entitled cause, to wit:

* * (Caption) * *

Comes now the defendant herein, and now files its petition for appeal, and the court now allows said appeal, upon the filing of an appeal bond in the sum of $35,000.00, which petition and allowance thereof reads in the words and figures following, to wit:

142 * * (Caption) * *

PETITION FOR APPEAL.

To the Honorable Thomas W. Slick, Judge of the United States District Court, for the Northern District of Indiana, Fort Wayne Division:

The Chesapeake and Ohio Railway Company, your petitioner, which is the defendant in the above entitled cause, prays that it may be permitted to take an appeal from the judgment entered in the above cause on the 16th day of January, 1932, to the United States Circuit Court of Appeals, for the Seventh Circuit, for the reasons specified in the assignment of errors which is filed herewith;

And your petitioner desires that said appeal shall operate as a supersedeas, and therefore prays that an order be made fixing the amount of security which said defendant shall give and furnish upon such appeal, and that upon giving such security all further proceedings in this court be suspended and stayed until the determination of said appeal by said United States Circuit Court of Appeals.

Dated April 5, 1932.

ALBERT H. COLE,
Attorney for Defendant and Appellant.

Appeal allowed upon giving bond as required by law
143 for the sum of $35,000.00.

Dated April 5th, 1932.

THOS. W. SLICK
Judge.

And now the defendant files its assignment of errors, which assignment of errors reads in the words and figures following, to wit:

144 * * (Caption) * *

ASSIGNMENT OF ERRORS.

Comes now said The Chesapeake and Ohio Railway Company, defendant in the above entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of the appeal herewith petitioned for in this

cause, from the judgment of this court entered on the 16th day of January, 1932:

1. That the said District Court erred in sustaining the plaintiff's demurrer to the amended first paragraph of said defendant's plea in abatement denying the jurisdiction of the court, said first paragraph of said plea in abatement being addressed to the first paragraph of plaintiff's complaint.

2. That said District Court erred in finding against the defendant on the second paragraph of its plea in abatement, which paragraph of said plea in abatement was addressed to the second paragraph of plaintiff's complaint.

3. That said District Court erred in permitting the witness Roland R. Schulz, while testifying on behalf of the plaintiff, in chief, on direct examination, to answer, over the objection of the defendant, the following question: "I will ask you to state to the jury what the law of Kentucky was in that respect in full force and effect on November 29, 1930, in the State of Kentucky?" To which question said wit-
145 ness made the following answer: "This was the law:

That every common carrier by railroad while engaged in commerce in this State shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, to his or her personal representative for such injury or death to such employee resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, docks, boats, wharves or other equipment. In all actions hereafter brought against such common carrier by railroad, or by virtue of any of the provisions of this Act to recover damages for personal injury to any employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; provided, that no such employee who may have been injured or killed shall be held to have been guilty of contributory negligence in any case where the violation of such common carrier of any statute, State or Federal, enacted for the safety of employes contributed to the injury or death of such employee. That in any action brought against any common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any employee, such employee

shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute, State or Federal, enacted for the safety of employee, contributed to the injury or death of such employee," and in overruling defendant's motion to strike out said answer, for the reasons stated in defendant's said objection and motion, namely, that the evidence sought to be
146 elicited could have reference solely to the cause of action declared upon in the second paragraph of complaint, of which the court had no jurisdiction for the reason that the same was a suit of a civil nature arising out of a law of the United States, the same being the Federal Safety Appliance Act; that by the provisions of Section 31 of the Federal Judicial Code no suit shall be brought in any District Court by any original process or proceeding in any other district than that whereof the defendant is an inhabitant; that it was alleged and proved that the defendant was an inhabitant of the State of Virginia and the mere fact that a diversity of citizenship might exist conferred jurisdiction only where the same was founded solely on the fact that the action was between citizens of different states, this case not coming within the exception contained in Section 31 for the reason that jurisdiction was founded not solely upon diversity of citizenship but also the fact that the case arises under a law of the United States.

4. That said District Court erred in refusing to permit the witness John Robbins while testifying as a witness for plaintiff, on cross-examination on plaintiff's case in chief, to answer the following question: "What was the practice at Russell with reference to cars which came there to be repaired at the shops from other divisions, as to whether these cars were frequently held on different repair tracks for a considerable period of time before finally reaching the shops?" the defendant having offered to prove by the said witness while he was on the stand and before the ruling complained of in answer to said question, that it was the common practice in the operation of the yards and shops at Russell that cars coming to the Russell Shops from other divisions were frequently held for considerable periods on different repair tracks including those under the control of the witness, without being sent to the shops.

147 5. That said District Court erred in refusing to permit the witness John Robbins, while testifying as a witness for plaintiff on cross-examination on plaintiff's case in chief, to answer the following question: "What is the fact

as to whether cars which came from Parson's Yard under the direction of Mr. Ehrman, with the cards tacked on in the same form as Plaintiff's Exhibit 1, being form BF four, after arrival at the Russell Yards were from time to time sent out on the road to be loaded without ever going to the Russell Shops?" the defendant having offered to prove by the said witness, while he was on the stand and before the ruling complained of, that it commonly happened that cars of the kind described in the question were sent out on the road without being sent to the shops first.

6. That said District Court erred in overruling defendant's motion to direct the jury to return a verdict in favor of the defendant.

7. That said District Court erred in refusing to give to the jury instruction numbered 1 of the instructions tendered by the defendant, which was of the following tenor:

There can be no recovery in this case on the first paragraph of the plaintiff's complaint and as to such paragraph your finding should be in favor of the defendant.

8. That said District Court erred in refusing to give to the jury instruction numbered 2 of the instructions tendered by the defendant, which was of the following tenor:

There can be no recovery in this case on the second paragraph of the plaintiff's complaint and as to such paragraph your finding should be in favor of the defendant.

9. That said District Court erred in refusing to give to the jury instruction numbered 3 of the instructions tendered by the defendant, which was of the following tenor:

The plaintiff cannot recover in this case, in any event, unless you find that he was employed by the defendant in Interstate Commerce at the time of receiving his alleged
148 injuries. One who is engaged in switching empty cars in a railroad yard is not engaged in Interstate Commerce unless the cars in question have been assigned to be loaded with Interstate freight. Under such circumstances if it is not known whether the cars in question are to be loaded with Interstate freight or whether their next movement will be confined within the limits of the state, their movement in the yards is not a movement in Interstate Commerce and the employees who are moving them are not engaged therein.

10. That said District Court erred in refusing to give to the jury instruction numbered 4 of the instructions tendered by the defendant, which was of the following tenor:

I instruct you that if the cars which plaintiff was en-

deavoring to uncouple were provided with couplers which would couple automatically by impact and which could be uncoupled without the necessity of men going between the ends of the cars, the defendant was not guilty of violating the Safety Appliance Act as charged in the complaint.

11. That said District Court erred in refusing to give to the jury instruction numbered 5 of the instructions tendered by the defendant, which was of the following tenor:

It is generally conceded to be true that, however perfect an uncoupling apparatus may be, it will not work at all while there is a binding friction on the lifting pin. A failure of the pin to lift on the first effort or attempt is not sufficient evidence of any existing defect unless it appears that the effort was of a character and made at a time when it would have naturally been effective save for a defect.

Penn. R. Co. v. *Jones*, 300 Fed. 525.

12. That said District Court erred in refusing to give to the jury instruction numbered 6 of the instructions tendered by the defendant, which was of the following tenor:

While the Act of Congress makes it unlawful for any common carrier, engaged in Interstate Commerce by railroad, to haul or permit to be hauled or used on its line any car used in moving Interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars, and pursuant to said Act, the Interstate Commerce Commission has made certain orders specifying the number, dimensions, location and manner of application of couplers and other appliances therein prescribed, yet I charge you that neither the language nor the purpose of the statute requires the equipment of cars with appliances that will operate with unfailing precision on every occasion. Such a degree of perfection is not essential to the safety of the employe, for whose protection the equipment is required. It may be expected from the very construction of such
149 devices that in the course of time, and under the unavoidable varying conditions incident to the railway traffic there will be occasions when more than one impact may be required in order to effect a coupling or when more than one attempt will be required in order to effect an uncoupling. A railroad company cannot be held to have violated the statute until the inefficiency of the device has been disclosed by some reasonable test that would justify the conclusion that it was defective.

St. L. S. W. Ry. Co. v. *Bounds*, 244 S. W. 1099.

13. That said District Court erred in giving to the jury the following and each of the following portions of his charge: "He (the plaintiff) also charges that the defendant used the same push-down type of uncoupling lever and handle of the lever which when operated in the usual, normal and ordinary way dropped fifteen inches over all." * * * "The first count or the first paragraph of the complaint is based on what we call the Safety Appliance Act." "Under the first paragraph of the complaint if you find there was a violation of the Safety Appliance Act and that the plaintiff and defendant were engaged in interstate commerce and that the plaintiff's injury was the proximate result of the violation of the Safety Appliance Act the plaintiff would be entitled to recover." "The Interstate Commerce Commission has provided certain rules and regulations and has provided the distance above the rail that interstate carriers shall be permitted to use couplers and uncouplers. The rule of the Interstate Commerce Commission provides that handles of uncoupling levers shall have a minimum drop of twelve inches, a maximum of fifteen inches over all." * * * "The serious question in this case for you to consider is the question of whether or not the defendant violated the Safety Appliance Act, the uncoupling act, in that it did not have an uncoupling lever that complied with the Safety Appliance Act and the rules of the Interstate Commerce Commission with reference to the height above the rail and the maximum movement of the handle of the uncoupling device. If you find the defendant did violate
that rule or a provision of the Safety Appliance Act
150 and the plaintiff's injury was the proximate result
of such violation, then the plaintiff is entitled to recover in this case," for the reason stated in defendant's exception, thereto made at the time and before the jury retired, said exception being as follows: "The defendant excepts to the refusal of each of the instructions tendered by it and further excepts to that portion of the Court's charge wherein the jury are told that they are entitled to award a recovery if the lever in question dropped more than fifteen inches over all, for the reason that there is no provision in the Safety Appliance Act, or any regulation promulgated thereto by the Interstate Commerce Commission which contains any such requirements with reference to the lever as described in the complaint and also described in the evidence."

14. That said District Court erred in overruling defendant's motion and application for a new trial for the reason that the damages awarded were grossly excessive.

Wherefore, the said defendant prays that the said judgment may be reversed and for such other and further relief as to the court may seem just and proper.

Dated April 5th, 1932.

ALBERT H. COLE
Attorney for Defendant.

Endorsed: Filed Apr. 5, 1932. Margaret Cowgill, Clerk.

151 And now the defendant files its appeal bond, in the sum of $35,000.00 with the United States Fidelity and Guaranty Company, as surety thereon, which bond is now approved by the court and is ordered filed and reads in the words and figures following, to wit:

APPEAL BOND.

Know All Men By These Presents, that we, The Chesapeake and Ohio Railway Company, as principal, and the United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto James B. Moore, in the full and just sum of Thirty-five Thousand Dollars, to be paid to the said James B. Moore, his heirs, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our seals, and dated this 5th day of April, 1932.

Whereas, lately, at the December term of the District Court of the United States for the Northern District of Indiana, Fort Wayne Division, in a suit depending in said court between James B. Moore, plaintiff, and The Chesapeake and Ohio Railway Company, defendant, and numbered At Law No. 402 on the docket of said court, a judgment was rendered against the said The Chesapeake and Ohio Railway Company at the December Term of said court, and said The Chesapeake and Ohio Railway Company has petitioned for and been allowed by said District Court an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, and a citation has been issued, directed to the said James B. Moore, citing him to appear in the United States

Circuit Court of Appeals for the Seventh Circuit thirty days from and after the date of such citation.

Now, the condition of the above obligation is such that if the said The Chesapeake and Ohio Railway Company shall prosecute said appeal to effect, and answer all damages and costs, if it fails to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

152 THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
By ALBERT H. COLE,
Its State Counsel.

UNITED STATES FIDELITY & GUARANTY CO.,
Baltimore, Md.
By D. H. HARTER,
Its Attorney-in-Fact.

State of Indiana, }
County of Miami, } ss.

Before me, the undersigned, a Notary Public in and for said county and state, personally appeared Albert H. Cole, State counsel for The Chesapeake and Ohio Railway Company and D. H. Harter, Attorney-in-Fact for the United States Fidelity and Guaranty Company and acknowledged the execution of the foregoing bond for and on behalf of said respective corporations.

Witness my hand and notarial seal this 5th day of April, 1932.

MILDRED BELL EASTER,
Notary Public.

(Seal)

My commission expires: June 9, 1935.

Approved by:
THOS. W. SLICK
Judge District Court of the United States for the Northern District of Indiana, Fort Wayne Division.

155 And now the defendant files its praecipe for transcript on appeal, together with notice of filing of such praecipe and acknowledgment of service endorsed thereon, which praecipe, notice, and acknowledgment of service read in the words and figures following, to wit:

156 * * (Caption) * *

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals, for the Seventh Circuit, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following, and no other, papers and exhibits, to-wit:

1. The following pleadings: the complaint, plea in abatement denying the jurisdiction of the court, application for leave to amend first paragraph of plea in abatement denying the jurisdiction of the court, amended first paragraph of plea in abatement, demurrer to defendant's plea in abatement to the first paragraph of plaintiff's complaint, answer in denial, defendant's motion for directed verdict in favor of defendant and defendant's motion and application for a new trial and application for leave to file same;
2. All proceedings, rulings and orders of the court;
3. The verdict and judgment;
4. The stipulation that certain exhibits be not manually incorporated in the bill of exceptions but be sent direct to the United States Circuit Court of Appeals, together with the order of the court with reference thereto;
5. The original Bill of Exceptions;

157 6. The petition for and order of allowance of the appeal;

7. The assignment of errors;
8. The appeal;
9. The appeal bond and order of approval thereof;
10. The original citation with acknowledgment or proof of service thereof;
11. This praecipe, with acknowledgment or proof of service thereof.

Dated April 5, 1932.

ALBERT H. COLE
Attorney for Appellant.

158 * * (Caption) * *

NOTICE OF FILING PRAECIPE.

To Teeter & Hartzler, Attorneys for Appellee:

Please take notice that on the 5th day of April, 1932, the undersigned filed with the Clerk of this court a praecipe for the record to be transmitted to the United States Circuit Court of Appeals for the Seventh Circuit on the appeal allowed in the above cause, a copy of which praecipe is herewith served upon you.

Dated this 5th day of April, 1932.

ALBERT H. COLE
Attorney for Appellant.

We acknowledge service of the foregoing notice and the praecipe therein referred to by the delivery of a copy thereof to us this 5th day of April, 1932.

TEETER & HARTZLER
By C. L. TEETER
Attorneys for Appellee.

159 CLERK'S CERTIFICATE.

United States of America }
Northern District of Indiana } ss:

I, Margaret Cowgill, Clerk of the United States District Court in and for the Northern District of Indiana, do hereby that the annexed and foregoing transcript is a full and true copy of the original:

1. The following pleadings: the complaint, plea in abatement denying the jurisdiction of the court, application for leave to amend first paragraph of plea in abatement denying the jurisdiction of the court, amended first paragraph of plea in abatement, demurrer to defendant's plea in abatement to the first paragraph of plaintiff's complaint, answer in denial, defendant's motion for directed verdict in favor of defendant and defendant's motion and application for a new trial and application for leave to file same.

2. All proceedings, rulings and orders of the court;

3. The verdict and judgment;
4. The stipulation that certain exhibits be not manually incorporated in the bill of exceptions but be sent direct to the United States Circuit Court of Appeals, together with the order of the court with reference thereto;
5. The original Bill of Exceptions; (Original)
6. The petition for and order of allowance of the appeal;
7. The assignment of errors;
8. The appeal;
9. The appeal bond and order of approval thereof;
10. The original citation with acknowledgement or proof of service thereof;
11. This (Original) praecipe, with acknowledgement or proof of service thereof.

now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my
160 name and affixed the seal of the aforesaid Court at Fort Wayne, Indiana, this 28th day of April, A. D., 1932.

MARGARET COWGILL,
(Seal) *Clerk, United States District Court.*
By HELEN SWEENEY,
Deputy Clerk.

152 And now the defendant files its citation, which citation is ordered issued and is accordingly now done, the acknowledgment of service endorsed thereon, all of which is ordered filed by the court, and reads in the words and figures following, to wit:

153 • • (Caption) • •

CITATION.

United States of America } ss.

To James B. Moore, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, State of Illinois, within thirty days from the date hereof, pursuant to an order allowing an appeal from the District Court of the United States for the Northern District of Indiana, Fort Wayne Division in a suit wherein The Chesapeake and Ohio Railway Company is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against said appellant should not be corrected, and why speedy justice should not be done to the parties on that behalf.

Witness Thomas W. Slick, Judge of the District Court of the United States, this fifth day of April, 1932, and in
154 the one hundred fifty-sixth (156th) year of the Independence of the United States of America.

THOS. W. SLICK,
Judge of the District Court for the Northern District of Indiana, Fort Wayne Division.

Service of a copy of the foregoing citation is acknowledged this 5th day of April, 1932.

TEETER & HARTZLER,
By C. L. TEETER,
Attorney for Plaintiff and Appellee.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 125, inclusive, contain a true copy of the printed record, printed under my supervision and filed on the twenty-first day of June, 1932, on which the following entitled cause was heard and determined:

The Chesapeake & Ohio Railway Company,
Appellant,

vs.

James B. Moore,
Appellee,

No. 4779, October Term, 1932, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 3rd day of May, A. D. 1933.

(Seal)

FREDERICK G. CAMPBELL
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room in the City of Chicago, in said Seventh Circuit on the fourth day of October, 1932, of the October Term, in the year of our Lord One Thousand Nine Hundred and Thirty-Two, and of our Independence the One Hundred and Fifty-Seventh.

The Chesapeake & Ohio Railway Company *vs.* James B. Moore	4779	Appeal from the District Court of the United States for the Northern District of Indiana, Fort Wayne Division.

And on, to-wit: On the sixteenth day of March, 1933, there was filed in the office of the Clerk of this court, the opinion of the court, which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4779. October Term, 1932, January Session, 1933.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, *Appellant,*

vs.

JAMES B. MOORE, *Appellee.*

Appeal from the District Court of the United States for the Northern District of Indiana, Fort Wayne Division.

March 16, 1933.

Before EVANS and SPARKS, *Circuit Judges,* and WILKERSON, *District Judge.*

Appellee brought this action in the Federal District Court for Northern Indiana, to recover damages for personal injuries resulting to him while in the employ of appellant as a yard switchman at Russell, Kentucky.

The complaint is in two paragraphs and in each recovery is sought for the same injury, which it is alleged was caused by a defective coupler while appellee was attempting to uncouple a freight car in the performance of his duties as switchman. Each paragraph alleges that appellant, at all times mentioned in the complaint, was and now is a corporation organized under and by virtue of the laws of Virginia, and at all said times was engaged in operating a steam rail-

road as a common carrier engaging in interstate commerce in and between and through Virginia, West Virginia, Ohio, Indiana, and Illinois, and was doing business in the northern Federal district of Indiana.

The descriptions of the coupler and its appurtenances and the manner in which the injury happened are the same in each paragraph; that is to say, it is alleged that the uncoupling lever was known as a push-down type and was designed to be operated by a lever extending from the coupler to the outside line of the car, by means of which, when in good order, it was unnecessary for the switchman to step between the cars to operate it; that the normal, ordinary and usual manner of uncoupling a car was to place one hand on the outward end of the lever and push it down, and this would normally pull up the lock block or coupling pin, thereby releasing the coupler knuckles and disengaging the couplers; that while the cars were in motion appellee, in the manner just described, attempted to uncouple a car, but when he pushed down on the lever it dropped more than fifteen inches, and descended inwardly toward the wheel of the car to a point less than eighteen inches from the top of the rail without releasing the knuckles or disengaging the couplers, which result was due to the lever and its parts and appurtenances being bent, twisted, and in a defective condition at the time appellee attempted to uncouple the car. It is further alleged that the descent of the lever handle to less than eighteen inches above the top of the rail caused appellee's body to become unbalanced and to be thrown forward between the ends of the cars, and his right arm to become engaged with the wheel of the car, and as a result thereof it was necessary to amputate a part of the arm.

The wrong with which appellee seeks to charge appellant in each paragraph is that appellant unlawfully and negligently used and permitted to be used on its railroad a car (1) equipped with a push-down type of uncoupling lever, the handle of which lever when operated in the normal way descended to a point less than eighteen inches from or above the top of the rail without causing or engaging the lock block or pin to release the knuckle; (2) equipped with a push-down type of uncoupling lever, the handle of which when operated in the normal way dropped more than fifteen inches over all; (3) whose uncoupling lever, its parts and appurtenances,

were bent, twisted, and defective in condition and placement, and which interfered with and prevented the lock block or pin from releasing the knuckle of the coupler and prevented an uncoupling of the cars in the normal way; (4) whose uncoupling lever, its parts and appurtenances were bent, twisted, and defective in condition and placement, and which prevented the coupler from being uncoupled without the necessity of a man going between the ends of the cars in order to effect said uncoupling; (5) the coupler of which, when coupled to another car, could not be uncoupled in the normal way without the necessity of a man going between the ends of the cars to effect said uncoupling; (6) not equipped with couplers coupling automatically by impact and which could be uncoupled without the necessity of a man going between the ends of the cars.

The first paragraph alleges that at the time of the injury appellee was engaged with appellant in interstate commerce. It also alleged therein:

> "That plaintiff brings this action against the defendant under and by virtue of an Act of Congress of the United States, approved April 22, 1908, and Amendments thereto, and which Act is commonly known as the Federal Employers' Liability Act, and under a certain Act of the Congress of the United States known as the Safety Appliance Acts and the Rules and Orders lawfully promulgated thereunder by the United States Interstate Commerce Commission; that said laws of the United States and Rules and Orders aforesaid were in full force and effect at all times * * mentioned; that said laws of the United States give to this Court jurisdiction to hear and determine this cause of action."

The second paragraph, in addition to those allegations which are hereinbefore referred to as being in both paragraphs, also alleges that appellee is a citizen of Indiana and a resident of the northern Federal district of that state, and that the amount in controversy exceeds three thousand dollars exclusive of costs and interest. It is further alleged that at the time of the injury appellee was engaged with appellant in intrastate commerce. It was also alleged:

> "That plaintiff brings this action against the defendant under and by virtue of an Act of the Congress of the United States commonly known as the Safety Appliance Acts and the Rules and Orders promulgated by the In-

terstate Commerce Commission of the United States, and also under the laws of the State of Kentucky * * *,"

which laws of Kentucky are therein set forth.[1]

Appellant appeared specially and filed in two paragraphs a plea in abatement to the jurisdiction of the court. The first paragraph was directed to the first paragraph of complaint. It denied that appellee was engaged in interstate commerce at the time of the injury, and alleged that appellant was an inhabitant of the Eastern District of Virginia, and that, so far as jurisdiction might depend on the fact that the suit arose under the Federal Safety Appliance Act, the cause of action could not be brought in any other district than that whereof appellant was an inhabitant.

The second paragraph of the plea in abatement was directed to the second paragraph of complaint, and challenged the jurisdiction of the court over the cause of action and over the person of the appellant. It alleged that appellee was not a resident of the Northern District of Indiana, and that appellant was an inhabitant of the Eastern District of Virginia, and that the action, arising under the Federal Safety Appliance Acts, could not be brought against appellant by any original process or proceeding in any other district than the Eastern District of Virginia.

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[1] "SEC. 820b-1. * * That every common carrier by railroad while engaged in commerce in this state shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, to his or her personal representative for such injury or death to such employee resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, docks, boats, wharves or other equipment.

"SEC. 820b-2. * * In all actions hereafter brought against such common carrier by railroad, or by virtue of any of the provisions of this act to recover damages for personal injury to any employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: provided, that no such employee who may have been injured or killed shall be held to have been guilty of contributory negligence in any case where the violation of such common carrier of any statute, state or federal, enacted for the safety of employees contributed to the injury or death of such employee.

"SEC. 820b-3. * * That in any action brought against any common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any employee, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute, state or federal, enacted for the safety of employee, contributed to the injury or death of such employee."

The court sustained appellee's demurrer to the first paragraph of the plea in abatement. A preliminary hearing was had before the court on the second paragraph of the plea and it was overruled.

The cause was submitted to the court for trial before a jury. The court instructed the jury that the first paragraph of complaint was based upon a violation of the Federal Safety Appliance Act, and that the second paragraph was based upon the statutes of Kentucky. A general verdict was rendered for appellee for $30,000, which, so far as the record discloses, was upon both paragraphs, and judgment was rendered for appellee in that sum.

SPARKS, *Circuit Judge.* The first question presented for our consideration is one of jurisdiction. The first paragraph of complaint does not allege diversity of citizenship, but it alleges that the action is brought under and by virtue of an Act of Congress, approved April 22, 1908, which is known as the Federal Employers' Liability Act,[2] secs. 1, 3, and 4, c. 149, 35 Stats. 65, 66; 45 U.S.C.A., secs. 51, 53, and 54; and

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[2] Federal Employers' Liability Act.

45 U.S.C.A., Sec. 51.

"Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

45 U.S.C.A., Sec. 53.

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, * * * the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: * * *"

45 U.S.C.A., Sec. 54.

"In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to * * * any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

45 U.S.C.A., Sec. 56.

"* * * Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. * * *"

also sec. 6 of that Act as amended April 5, 1910, sec. 1, c. 143, 36 Stats. 291; 45 U.S.C.A., sec. 56.

It is also alleged that the first paragraph is brought under and by virtue of an Act of Congress (approved March 2, 1893) known as the Federal Safety Appliance Act,[3] (secs. 2 and 8, c. 196, 27 Stats. 531 and 532; 45 U.S.C.A. secs. 2 and 7; and sec. 1, c. 976, 32 Stats. 943; 45 U.S.C.A., sec. 8) and the orders promulgated thereunder by the Interstate Commerce Commission. (Order of March 13, 1911, Roberts' Federal Liabilities of Carriers, Vol. 2, pp. 2010, 2016.[4])

It will be observed that the Employers' Liability Act deals exclusively with acts of negligence, while the Safety Appliance Act is not based upon negligence of the employer, but it imposes a duty upon the employer with relation to car couplers, the violation of which duty renders the employer liable to the employee for proximate damages arising therefrom, regardless of employer's negligence.

The jurisdiction and venue of causes of action brought under the Safety Appliance Act are governed by section 51 of the Judicial Code, 28 U.S.C.A., sec. 112, and in so far as it applies to this action is as follows:

"* * * no civil suit shall be brought in any district

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[3] Safety Appliance Act.

45 U.S.C.A., Sec. 2.

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

45 U.S.C.A., Sec. 7.

"Any employee of any common carrier engaged in interstate commerce by railroad who may be injured by any locomotive, car, or train in use contrary to the provision of this chapter shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

45 U.S.C.A., Sec. 8.

"* * * and the provisions and requirements relating to * * * automatic couplers * * * shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce. * * * and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith * * *."

[4] "Handles of uncoupling-levers of the 'rocking' or 'push-down' type shall be not less than eighteen (18) inches from top of rail when lock-block has released knuckle, and a suitable stop shall be provided to prevent inside arm from flying up in case of breakage. Location: One (1) on each end of car. When single lever is used it shall be placed on left side of end of car." (Roberts' Federal Liabilities of Carriers, Append. 2, Vol. 2, pages 2010, 2016).

court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Diversity of citizenship not having been pleaded in the first paragraph, the cause of action therein stated, in so far as it relies upon a violation of the Safety Appliance Act as a basis, must be brought in the district of appellant's residence. *McCormick Co.* v. *Walthers*, 134 U.S. 41; *In re Keasbey and Mattison Co.*, 160 U.S. 221; *Whittaker* v. *Illinois Central R. Co.*, 176 Fed. 130; *Steidle* v. *Reading Co.*, 24 F. (2d) 299.

Appellee, however, relies on amended section 6 of the Employers' Liability Act (*supra*) to sustain the trial court's jurisdiction, which provides that actions under that Act may, in plaintiff's discretion, be brought in a District Court of the United States in the district of defendant's residence, or in which the defendant shall be doing business, or in which the cause of action arose.

It was the duty of the trial court to determine the theory of the complaint. It did so, and instructed the jury that the first paragraph was based upon the Safety Appliance Act, and we think the court was right in this respect. Appellee alleged in this paragraph that the cause of action was brought under and by virtue of both acts, and also under the rules promulgated by the Interstate Commerce Commission under the Safety Appliance Act.

Regardless of what might have been the opinion of the court as to the theory of this paragraph when it overruled the plea in abatement, if indeed at that time it could have definitely determined the theory, its instruction to the jury in this respect was abundantly justified by the evidence, and was in no wise contrary to it; for every wrongful act complained of and supported by evidence, if true, constituted a violation of the Safety Appliance Act or the rules of the Interstate Commerce Commission promulgated thereunder.

In support of its contention in this respect, appellee relies upon *San Antonio & Aransas Pass Ry. Co.* v. *Wagner*, 241 U.S. 476. The cause of action therein stated was based upon the Employers' Liability Act, and the evidence showed a failure to comply with the Safety Appliance Act with re-

spect to a car coupler. It was there argued that in actions based upon the Employers' Liability Act the defendant could not be held liable without evidence of negligence. The court held that that Act and the Safety Appliance Act "are in *pari materia,* and where the Employers' Liability Act refers to 'any defect or insufficiency, *due to its negligence,* in its cars, engines, appliances,' etc., it clearly is the legislative intent to treat a violation of the Safety Appliance Act as 'negligence' —what is sometimes called negligence *per se.*" That case originated in the State of Texas and came to the Supreme Court of the United States by writ of error to the Supreme Court of that state. No question of venue or jurisdiction was raised, and we find in that opinion nothing inconsistent with our ruling in this case.

The second paragraph of complaint alleges diversity of citizenship, but does not allege that it is based on the Employers' Liability Act. It alleges that it is brought under and by virtue of the Federal Safety Appliance Acts and the rules of the Interstate Commerce Commission promulgated thereunder, and also under and by virtue of the statutes of Kentucky. Notwithstanding those allegations appellee now contends that this paragraph should not and cannot be construed to have been founded on the Safety Appliance Act, and that his reference to it in this paragraph was only "to supply the negligence, with certainty, required by the Kentucky Employers' Liability Act."

Assuming that the second paragraph is based exclusively upon the Kentucky Statutes, it then becomes quite clear that those statutes and the Safety Appliance Act can not be considered *pari materia,* because the requirements of the latter act and the orders promulgated thereunder by the United States Interstate Commerce Commission, apply only to interstate commerce, while the second paragraph alleges that at the time of the injury both parties were engaged in intrastate commerce. If under this paragraph, as suggested by appellee, he be permitted thus "to supply the negligence, with certainty, as required by the Kentucky Employers' Liability Act," this court would be thereby placed in the anomalous position of extending the benefits of the Safety Appliance Act to intrastate commerce.

We are convinced that appellee in his second paragraph attempted to state a cause of action under the Federal Safety Appliance Act as well as under the Statutes of Kentucky,

and he alleged facts therein which, if true, constituted a ground for Federal jurisdiction other than diversity of citizenship. Indeed, the court instructed the jury that appellee could not recover unless violation of the Federal Safety Appliance Act had been proven. That being the case, jurisdiction and venue were in the district of appellant's residence and not in the Northern District of Indiana.

The judgment is reversed and the cause remanded with instructions to grant appellee permission to amend his first paragraph of complaint, if he so desires, to conform exclusively to the theory that the acts complained of constitute a violation of the Federal Employers' Liability Act, and to amend his second paragraph of complaint, if he so desires, to conform exclusively to the theory that the acts complained of constitute a violation of the Employers' Liability Act of the State of Kentucky, and for further proceedings not inconsistent with this opinion.

And on the same day, to-wit: On the sixteenth day of March, 1933, the following further proceedings were had and entered of record, to-wit:

Thursday, March 16, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Present:

Hon. Evan A. Evans, Circuit Judge, presiding.
Hon. William M. Sparks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. James H. Wilkerson, District Judge.

The Chesapeake & Ohio Railway Company		Appeal from the District Court of the United States for the Northern District of Indiana, Fort Wayne Division.
4779	*vs.*	
James B. Moore		

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Indiana, Fort Wayne Division, and was argued by counsel.

On consideration whereof: It is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby remanded to the said District Court with instructions to grant appellee permission to amend his first paragraph of complaint, if he so desires, to conform exclusively to the theory that the acts complained of constitute a violation of the Federal Employers' Liability Act, and to amend his second paragraph of complaint, if he so desires, to conform exclusively to the theory that the acts complained of constitute a violation of the Employers' Liability Act of the State of Kentucky, and for further proceedings not inconsistent with the opinion of this court.

And afterwards, on the fifth day of April, 1933, there was filed in the office of the Clerk of this court a motion for stay of mandate, which said motion is in the words and figures following, towit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

The Chesapeake and Ohio Railway Company, *Appellant*, *vs.* James B. Moore, *Appellee.* } Cause No. 4779.

MOTION OF APPELLEE FOR AN ORDER STAYING THE ISSUANCE OF MANDATE.

Comes now James B. Moore, Appellee herein, by his attorneys, and respectfully represents to the Court:—

1. That on the 16th day of March, 1933, an order was made and entered by this Court reversing the judgment of the District Court of the United States, for the Northern District of Indiana, Fort Wayne Division.

2. That this cause having been finally determined in this Court under Rule 28 of the Court, a mandate will be issued to the Court below on or before the 6th day of April, 1933, unless stayed by the further order of this Court.

3. That your petitioner is planning and proposes to file a petition in the Supreme Court of the United States within three months after the entry of the order of this Court in this cause, petitioning the Supreme Court to require, by certiorari, that this cause be certified to said Court for determination by it in accordance with Sections 1 and 7 of an act of Congress of the United States, approved February 13th, 1925, entitled, "An Act to Amend the Judicial Code and to further Define the Jurisdiction of the Circuit Court of Appeals and of the Supreme Court and for other purposes."

Wherefore, your petitioner prays that an order be entered herein staying the issuance of the mandate of this Court in this cause until the further order of the Court.

TEETER & HARTZLER,
Attorney for Appellee.

I hereby acknowledge the service upon me of a copy of Appellee's motion for an order staying this Court's mandate in the above cause, this 31st day of March, 1933.

ALBERT H. COLE,
Attorney for Appellant.

Endorsed: Filed April 5, 1933. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the fifth day of April, 1933, the following further proceedings were had and entered of record, to-wit:

Wednesday, April 5, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Before:

Hon. Evan A. Evans, Circuit Judge.

4779	The Chesapeake & Ohio Railway Company, *vs.* James B. Moore.	Appeal from the District Court of the United States for the Northern District of Indiana, Fort Wayne Division.

Now this day comes counsel for appellee and presents a motion for a stay of the mandate of this court, pending a petition to the Supreme Court of the United States for a writ of certiorari.

On consideration whereof: It is now here ordered that the mandate in this cause be, and the same is hereby stayed until further order of this court.

It is further ordered that counsel for appellee proceed with diligence and promptly file the petition for a writ of cer-

tiorari in the Supreme Court of the United States, and upon the filing of said petition file in this court proof of the filing of said petition in said court.

And afterwards, to-wit: On the Second day of May, 1933, there was filed in the office of the Clerk of this court the Praecipe for Supreme Court Record, which said Praecipe for Supreme Court Record is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

The Chesapeake & Ohio Railway Company, *Appellant,*
vs.
James B. Moore, *Appellee.*
No. 4779.

To the Clerk:

Please prepare on behalf of James B. Moore, Appellee, a certified transcript of the Record in this cause, and such additional copies thereof as is required to be filed to accompany a Petition for a Writ of Certiorari in accordance with the rules of the Supreme Court of the United States. Said transcript should include the proceedings of this Court in this cause, to-wit: the Record of the evidence and proceedings in the District Court of the United States for the Northern District of Indiana, the Opinion of this, The United States Circuit Court of Appeals for the Seventh Circuit in this cause, the decision and judgment rendered by this Court in this cause, the motion of appellee to stay the Mandate of this Court, and this Court's order staying said Mandate.

TEETER & HARTZLER,
Attorneys for Appellee.

Endorsed: Filed May 2, 1933, Frederick G. Campbell, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 129 to 142, inclusive, contain a true copy of the proceedings had and papers filed, made in accordance with the Praecipe for Supreme Court Record, filed on the 2nd day of May, 1933 in the case of

The Chesapeake & Ohio Railway Company,
Appellant,

vs.

James B. Moore,
Appellee,

No. 4779, October Term, 1932, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circut Court of Appeals for the Seventh Circuit, at the City of Chicago, this 3rd day of May, A. D. 1933.

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Seal)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(4099)

FILE COPY

IN THE

Supreme Court of the United States

No. 17[illegible]

JAMES B. MOORE,

Petitioner,

—against—

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT WITH SUPPORTING BRIEF

CHESTER L. THEYER,
LLOYD HARTSLER,
EDWARD DAVIDSON,
Counsel for Petitioner.

JOHN P. BRAMHALL,
Of Counsel.

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IN THE

Supreme Court of the United States

TERM, 1933.

No.

JAMES B. MOORE,

Petitioner,

—against—

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

The petitioner, James B. Moore, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit (No. 4779) entered on March 16th, 1933 (R. 139) reversing a judgment for $30,000 rendered by the United States District Court for the Northern District of Indiana in favor of plaintiff, petitioner herein (R. 28), on the verdict for a similar amount returned by the jury at the trial of this cause (R. 22).

Petitioner originally brought this action in the District Court of the United States for the Northern District of Indiana to recover damages for the loss of his forearm resulting to him while he was employed at Russell, Kentucky, as a yard switchman by respondent, an interstate common carrier by railroad. The case was tried before the Honorable Thomas W. Slick, District Judge, and a jury, and upon the evidence submitted by both parties re-

sulted in the verdict for petitioner and judgment in accord therewith (R. 22, 28).

From this judgment appeal was taken by the defendant-respondent herein (R. 112), to the United States Circuit Court of Appeals for the Seventh Circuit, and was argued before the Honorable Evans and Sparks, Circuit Judges, and Wilkerson, District Judge (R. 130). THE CIRCUIT COURT OF APPEALS, in an Opinion (R. 130-139) written by the Honorable Sparks (R. 134), REVERSED THE JUDGMENT OF THE DISTRICT COURT ON THE GROUND THAT THE DISTRICT COURT DID NOT HAVE VENUE JURISDICTION OF THE CAUSES OF ACTION SET FORTH IN PETITIONER'S COMPLAINT (R. 134, 136, 138).

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The First Matter Involved Herein is the failure of the Seventh Circuit Court of Appeals to apply and give effect to the applicable Venue provision, amended Section 6, of the Federal Employers' Liability Act (45 U. S. C. A. Section 56) with respect to the first paragraph of petitioner's complaint.

The facts essential to an understanding of this Matter are as follows:

Petitioner's complaint (petition) consisted of two separate paragraphs (counts) or causes of action (R. 2-12).

The first paragraph (R. 2-6) set forth an action under the Federal Employers' Liability Act of 1908 (35 Stat. 65, U. S. Code, Title 45, Ch. 2, Secs. 51 *et seq.*), alleging that it governed the rights of petitioner and the liability of the respondent, an interstate railroad common carrier, in that both were engaged in interstate commerce and transportation at the time the petitioner sustained his injury. The negligence charged in said first paragraph and sought to be established, in compliance with the require-

ments of the Federal Employers' Liability Act, consisted of acts and omissions on the part of the respondent which constituted violations of the Federal Safety Appliance Act (Secs. 2 & 8, Chap. 196, 27 Stat. 531 & 532; 45 U. S. C. A. Secs. 2 & 7, and Sec. 1, Chap. 976, 32 Stat. 943; 45 U. S. C. A. Sec. 8) and Orders promulgated thereunder by the Interstate Commerce Commission (Order of March 13th, 1911). In particular the respondent was charged with using on its freight car a defective and inoperative uncoupling lever, a part of the coupler device of the car which, because of said defect, when operated by petitioner, caused his injury.

The evidence (R. 37-59) and issue respecting the plaintiff-petitioner's employment by and engagement with the respondent in interstate commerce and transportation at the time he sustained his injury was submitted by the trial Court to the jury, as follows (R. 101):

> "Under the first paragraph of the complaint if you find there was a violation of the Safety Appliance Act and THAT THE PLAINTIFF AND DEFENDANT WERE ENGAGED IN INTERSTATE COMMERCE, and that the plaintiff's injury was the proximate result of the violation of the Safety Appliance Act, the plaintiff would be entitled to recover."

The jury by its general verdict resolved this issue in favor of the plaintiff, petitioner herein (R. 22). The SEVENTH CIRCUIT COURT OF APPEALS DOES NOT HOLD OR INFER IN ITS OPINION THAT THERE WAS A FAILURE OF PROOF WITH RESPECT TO PLAINTIFF'S EMPLOYMENT IN INTERSTATE COMMERCE AT THE TIME HE SUSTAINED THE INJURY.

Petitioner in his first paragraph or cause of action alleged (R. 2), and on the TRIAL OF THIS CAUSE THE RESPONDENT ADMITTED AND STIPULATED (R. 37) THAT IT IS AN INTERSTATE COMMON CARRIER BY RAILROAD OPERATING

THROUGH THE STATE OF INDIANA, AND THAT AT THE TIME THIS ACTION WAS COMMENCED, IT WAS DOING BUSINESS WITHIN THE TERRITORIAL JURISDICTION OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA, FORT WAYNE DIVISION. And pursuant to this allegation and stipulation, the District Court of the United States for the Northern District of Indiana assumed venue jurisdiction over the respondent railroad by force of the mandate of the applicable Statute of the United States, to wit, Section 6 as amended of the Federal Employers' Liability Act (45 U. S. C. A. Sec. 56, Sec. 1, Chap. 143, 36 Stat. 291) which expressly provides for the venue of actions brought under the Federal Employers' Liability Act as follows:

> "Under this chapter AN ACTION MAY BE BROUGHT IN A DISTRICT COURT OF THE UNITED STATES IN THE DISTRICT of the residence of the defendant or in which the cause of action arose, or IN WHICH THE DEFENDANT SHALL BE DOING BUSINESS AT THE TIME OF COMMENCING SUCH ACTION."

The Seventh Circuit Court of Appeals however held and decided that the venue provision applicable to petitioner's first paragraph or cause of action is Section 51 of the Judicial Code (28 U. S. C. A. Sec. 112) which is the venue provision which would govern an action brought solely and exclusively under the Federal Safety Appliance Act, and which provides as follows:

> "NO CIVIL SUIT SHALL BE BROUGHT IN ANY DISTRICT COURT AGAINST ANY PERSON BY ANY ORIGINAL PROCESS OR PROCEEDING IN ANY OTHER DISTRICT THAN THAT WHEREOF HE IS AN INHABITANT; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

And, applying this latter venue provision, the Circuit Court of Appeals held that the Northern District Court of Indiana did not have venue jurisdiction over the first paragraph or cause of action because the Northern District of Indiana was not the district whereof the respondent was an inhabitant.

The Second Matter Involved Herein is the error of the Seventh Circuit Court of Appeals in its decision (with respect to petitioner's second paragraph or cause of action) wherein it held, in construing and interpreting the Federal Safety Appliance Act (45 U. S. C. A. Secs. 1 *et seq.*), that its provisions do *not* apply to cars engaged in intrastate commerce over an interstate railroad (R. 137).

The Third Matter Involved Herein is the error of the Seventh Circuit Court of Appeals (with respect to petitioner's second paragraph of cause of action) wherein it held that the Safety Appliance Act (45 U. S. C. A. Sec. 1 *et seq.*) is *not* in *pari materia* with the Employers' Liability Act of the State of Kentucky (R. 137).

Upon the erroneous rulings and conclusions of law set forth in the Second and Third Matters Involved Herein, the Seventh Circuit Court of Appeals based its decision that the District Court for the Northern District of Indiana did not have venue jurisdiction of the petitioner's second alternative cause of action which was predicated on an employment in intrastate commerce, the Employers' Liability Act of the State of Kentucky, and the existence of a diversity of citizenship between the parties.

The Fourth Matter Involved Herein is the denial by the Seventh Circuit Court of Appeals to petitioner of his federal right to establish in this action (predicated on the Federal Employers' Liability Act, or on the Employers' Liability Act of the State of Kentucky) the negligence of the respondent by evidence of its violations of the provi-

sions of the Federal Safety Appliance Act and Orders of the Interstate Commerce Commission promulgated in pursuance thereof, and to recover thereon, notwithstanding the defenses of contributory negligence and assumption of risk, which are made inoperative by force of Sections 53 and 54 of the Federal Employers' Liability Act and Sections 820b-2 and 820b-3 of the Kentucky Employers' Liability Act, when there is established a violation of a Federal Safety Statute.

The Circuit Court of Appeals in reversing the judgment of the District Court remanded the cause for retrial with instructions requiring the petitioner to amend his first paragraph of complaint so as to conform exclusively to the theory that the acts complained of constitute a violation of the Federal Employers' Liability Act and to amend his second paragraph of complaint so as to conform exclusively to the theory that the acts complained of constitute a violation of the Employers' Liability Act of the State of Kentucky as a condition precedent to the assumption of venue jurisdiction by the District Court of Northern Indiana of said causes of action (R. 138).

A compliance by petitioner with this requirement of the Circuit Court of Appeals necessitates a striking out from his complaint of all references to the violations by the respondent of the Federal Safety Appliance Act and Orders of the Interstate Commerce Commission, complained of therein. By so doing petitioner would be denied the benefit of Sections 53 and 54 of the Federal Employers' Liability Act which make inoperative the defenses of contributory negligence and assumption of risk where there is established a violation of a Federal Safety Statute, and further he would be denied the benefit of Sections 820b-2 and 820b-3 of the Kentucky Employers' Liability Act (R. 8) which similarly make inoperative the defenses of contributory negligence and assumption of risk when a viola-

tion of a Federal Safety Statute has likewise been established.

It is the contention of the petitioner that the remanding instructions of the Seventh Circuit Court of Appeals in the aforestated respects constitute a denial to the petitioner of his federal right to establish the negligence of the respondent by a showing that it violated a Federal Safety Statute, to wit, the Federal Safety Appliance Act and Order of the Interstate Commerce Commission promulgated pursuant thereto, and further constitutes a denial to petitioner of the benefits of the aforestated sections of the Federal Employers' Liability Act and the Kentucky Employers' Liability Act, which are the same, and which make inoperative the defenses of assumption of risk and contributory negligence where there has been established a violation of a Federal Safety Statute such as the Federal Safety Appliance Act.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

This Honorable Supreme Court of the United States is respectfully urged to grant petitioner's request for a writ of certiorari in this cause for the special and important reasons, as follows:

I.

THE DECISION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, WHEREIN IT FAILED TO GIVE EFFECT TO AND APPLY THE APPLICABLE VENUE PROVISION AMENDED SECTION 6 OF THE FEDERAL EMPLOYERS' LIABILITY ACT (45 U. S. C. A., SEC. 56) TO PETITIONER'S FIRST PARAGRAPH OR CAUSE OF ACTION:

(A) IS A DECISION WHICH IS IN CONFLICT WITH THE DECISIONS OF THE SIXTH AND THIRD CIRCUIT COURTS OF

APPEALS OF THE UNITED STATES ON THE SAME MATTER, AND CONTRARY TO THE CASES OF:

Southern Railway Company v. *Cochran*, 56 Fed. (2d) 1019, 1020, Circuit Court of Appeals, Sixth Circuit, decided 1932;

Rice v. *B. & O. RR. Company*, 42 Fed. (2d) 387, 391, 392, Circuit Court of Appeals, Sixth Circuit, decided 1930;

Steidle v. *Reading Company*, 24 Fed. (2d) 299-302, Circuit Court of Appeals, Third Circuit, decided 1928, certiorari denied 278 U. S. 609, 73 L. Ed. 534;

Phila. & R. Ry. Co. v. *Berman*, 295 Fed. 658, 659, Circuit Court of Appeals, Third Circuit, decided 1924.

(B) IS A DECISION OF AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS HONORABLE SUPREME COURT OF THE UNITED STATES, SINCE THE RIGHTS OF HUNDREDS OF THOUSANDS OF RAILROAD WORKERS AND EMPLOYEES ARE AFFECTED AND DETERMINED THEREBY;

(C) IS A DECISION OF AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY UNTENABLE, IN CONFLICT WITH THE WEIGHT OF FEDERAL AUTHORITY, AND CONTRARY TO THE CASES OF:

Southern Railway Company v. *Cochran*, 56 Fed. (2d) 1019, 1020, Circuit Court of Appeals, Sixth Circuit, decided 1932;

Rice v. *B. & O. RR. Co.*, 42 Fed. (2d) 387, 391, 392, Circuit Court of Appeals, Sixth Circuit, decided 1930;

Phila. & R. Ry. Co. v. *Berman*, 295 Fed. 658, 659, Circuit Court of Appeals, Third Circuit, decided 1924;

Steidle v. *Reading Co.*, 24 Fed. (2d) 299-302, Circuit Court of Appeals, Third Circuit, decided 1928, certiorari denied 278 U. S. 609, 73 L. Ed. 534;

San Antonio & Aransas Pass Ry. Co. v. *Wagner*, 241 U. S. 477, 484;

Baltimore & Ohio RR. Co. v. *Groeger*, 266 U. S. 521, 528;

Central Vermont Ry. Co. v. *Perry*, 10 Fed. (2d) 132, 134;

Director-General of Railroads v. *Ronald*, 265 Fed. 138, 140.

II.

THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS WHEREIN IT HELD THAT THE PROVISIONS OF THE FEDERAL SAFETY APPLIANCE ACT (45 U. S. C. A., SECS. 1 ET SEQ.) DO NOT APPLY TO CARS ENGAGED IN INTRASTATE COMMERCE OVER AN INTERSTATE RAILROAD IS A DECISION OF AN IMPORTANT FEDERAL QUESTION OF LAW IN CONFLICT WITH ALL OF THE APPLICABLE DECISIONS OF THIS HONORABLE SUPREME COURT OF THE UNITED STATES ON THE SAME MATTER, AND IS PARTICULARLY CONTRARY TO THE DECISIONS OF THIS COURT IN THE CASES OF:

Southern Railway Company v. *Railroad Commission of Indiana*, 236 U. S. 439;

Southern Railway Company v. *United States*, 222 U. S. 20;

Illinois Central RR. Company v. *Behrens*, 233 U. S. 473.

III.

THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS WHEREIN IT HELD THAT THE FEDERAL SAFETY APPLIANCE ACT (45 U. S. C. A., SECS. 1 ET SEQ.) IS NOT IN PARI MATERIA WITH THE EMPLOYERS' LIABILITY ACT OF THE STATE OF KENTUCKY IS A DECISION OF AN IMPORTANT FEDERAL QUESTION OF LAW IN CONFLICT WITH, AND PARTICULARLY CONTRARY TO, THE DECISION OF THIS HONORABLE SUPREME COURT OF THE UNITED STATES IN THE CASE OF:

Louisville & Nashville RR. Co. v. *Layton,* 243 U. S. 617-621.

IV.

THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS IN REMANDING THIS CAUSE FOR RETRIAL ON CONDITION THAT THE PETITIONER AMEND HIS COMPLAINT SO AS TO CONFORM EXCLUSIVELY TO THE THEORY THAT THE ACTS COMPLAINED OF CONSTITUTE A VIOLATION OF THE FEDERAL EMPLOYERS' LIABILITY ACT OR THE EMPLOYERS' LIABILITY ACT OF THE STATE OF KENTUCKY, WITHOUT REFERENCE TO THE FEDERAL SAFETY APPLIANCE ACT, IS A DECISION WHICH DEPRIVES THE PETITIONER OF HIS FEDERAL RIGHT TO AVAIL HIMSELF OF THE BENEFITS AND PROVISIONS OF A STATUTE, AND IS A DECISION OF AN IMPORTANT FEDERAL QUESTION OF LAW UNTENABLE AND IN CONFLICT WITH THE WEIGHT OF FEDERAL AUTHORITY:

San Antonio & Aransas Pass Ry. Co. v. *Wagner,* 241 U. S. 477, 484;

Baltimore & Ohio RR. Co. v. *Groeger*, 266 U. S. 521, 528;
Louisville & Nashville RR. Co. v. *Layton*, 243 U. S. 617-621;
Central Vermont Ry. Co. v. *Perry*, 10 Fed. (2d) 132, 134;
Great Northern Railway Co. v. *Donaldson*, 246 U. S. 121;
Director-General of Railroads v. *Ronald*, 265 Fed. 138, 140;
St. L., Iron Mountain & Southern Ry. Co. v. *Taylor*, 210 U. S. 281.

WHEREFORE, your petitioner respectfully prays that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit be granted.

JAMES B. MOORE,
Petitioner.

CHESTER L. TEETER,
Fort Wayne, Indiana,

LLOYD HARTZLER,
Fort Wayne, Indiana,

EDWARD DAVIDSON,
Fort Wayne, Indiana,

JOHN P. BRAMHALL,
Washington, D. C.,
Counsel for Petitioner.

POINT III.

The decision of the Circuit Court of Appeals wherein it reversed the judgment of the District Court, and remanded the case for retrial on the conditions imposed by it, to wit, that petitioner eliminate from his complaint all references to the respondent's violations of the Federal Safety Appliance Act, is a decision which deprives the petitioner of his federal right to avail himself of the exemption provisions of the Federal Employers' Liability Act and the Employers' Liability Act of the State of Kentucky, which provide that the defenses of contributory negligence and assumption of risk are not available to the respondent in an action wherein the negligence charged and established constitutes a violation of a federal safety statute.

The petitioner in order to conform to the remanding instructions of the Circuit Court of Appeals must necessarily eliminate from his complaint all reference to the respondent's violation of the Federal Safety Appliance Act as the negligence charged against it, and he would thereby be denied his federal right to (1) establish the negligence of the respondent by reference to and proof of the violation of the Federal Safety Appliance Act, and, (2) avail himself of the provisions of the Federal Employers' Liability Act and of the Employers' Liability Act of the State of Kentucky which eliminate the defenses of assumption of risk and contributory negligence when a violation of a federal safety statute is established (R. 59-61).

WHEREFORE, the order of the Seventh Circuit Court of Appeals, in this instant case, requiring the petitioner to amend his complaint as aforesaid, constitutes a denial to the petitioner of his federal right to avail himself of the benefits and provisions of a federal and/or state statute,

respectively the Federal Employers' Liability Act and the Employers' Liability Act of the State of Kentucky, and further said remanding order of the Seventh Circuit Court of Appeals is contrary to the weight of federal authority.

Louisville & Nashville R. R. Co. v. Layton, 243 U. S. 617-621;

San Antonio & Aransas Pass Ry. Co. v. Wagner, 241 U. S. 477, 484;

Baltimore & Ohio R. R. Co., v. Groeger, 266 U. S. 521, 528;

Central Vermont Ry. Co. v. Perry, 10 Fed. (2d) 132, 134;

Great Northern Railway Co. v. Donaldson, 246 U. S. 121;

Director-General of Railroads v. Ronald, 265 Fed. 138, 140;

St. L., Iron Mountain & Southern Ry. Co. v. Taylor, 210 U. S. 281.

CONCLUSION.

We respectfully submit that the Circuit Court of Appeals for the Seventh Circuit in this cause is in error, that its decision should be reversed, and the original judgment of the District Court of the United States for the Northern District of Indiana should be restored.

Respectfully submitted,

EDWARD DAVIDSON,
CHESTER L. TEETER,
LLOYD HARTZLER,
JOHN P. BRAMHALL,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 173.

JAMES B. MOORE,

Petitioner,

—against—

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF.

May it please this Honorable Court:

Petitioner in his Brief averred the pertinent facts essential to an understanding of the Points therein discussed, and of the matters discussed by the Court of Appeals in its Opinion rendered in this cause which wholly concerned the Venue Jurisdiction of the District Court. Respondent in its "Brief on the Merits" assigns and argues matters not discussed in said "Opinion" of the Court of Appeals, or in the Petitioner's Brief. It is to that new matter in Respondent's "Brief" that petitioner directs this Reply Brief.

Supplemental Statement of the Case.

At the time petitioner sustained his injury HE WAS ASSISTING HIS CREW TO SWITCH FREIGHT CARS OUT OF A "CUT" OR GROUP OF CARS coupled together, and to place them on

various classification tracks in the respondent's railroad yard at Russell, Kentucky, FOR THE DUAL PURPOSE OF ASSISTING THE RESPONDENT TO MOVE AND TRANSPORT THESE CARS TO THEIR RESPECTIVE DESTINATIONS IN BOTH INTERSTATE AND INTRA-STATE COMMERCE (R. 51, 52).

As respects the intra-state cars in the "cut" as to which a part of the petitioner's work was concerned, the evidence unquestionably established that petitioner was engaged in intra-state commerce as alleged in his second paragraph or cause of action of his complaint. Wherefore, THE GENERAL VERDICT OF THE JURY ON THE SECOND CAUSE OF ACTION IS SUPPORTED BY THE EVIDENCE WHICH ESTABLISHED THE ALLEGATIONS OF PETITIONER'S SECOND PARAGRAPH OF THE COMPLAINT (R. 7-12), TO WIT: THAT HE WAS ENGAGED IN INTRA-STATE COMMERCE AND WAS ENTITLED TO A RECOVERY BY THE PROVISIONS OF THE EMPLOYERS' LIABILITY ACT OF THE STATE OF KENTUCKY (in which State the injury to petitioner occurred), for the negligence of the respondent, arising from its violation of the Federal Safety Appliance Act as therein set forth.

As respects the interstate cars with which petitioner's work was also directed to and concerned, the evidence further established the petitioner's allegations of his first cause of action, to wit, that he was engaged in interstate commerce and was entitled to a recovery by the provisions of the Federal Employers' Liability Act, as averred in the first paragraph of the complaint. Wherefore, the general verdict of the jury on the first cause of action is likewise supported by the evidence.

THAT THE GENERAL VERDICT OF THE JURY ON BOTH CAUSES OF ACTION IS SUPPORTED BY THE EVIDENCE IN THE RECORD IS RECONCILABLE SINCE THE EVIDENCE ESTABLISHED THAT PETITIONER'S WORK AT THE TIME HE WAS INJURED HAD A DUAL FUNCTION, TO WIT: IN CONNECTION WITH CARS, SOME OF WHICH WERE THEN ENGAGING IN INTERSTATE COMMERCE, AND THE OTHERS IN INTRA-STATE COMMERCE. As the District

Court had appropriate jurisdiction over both actions averred in the complaint, as respects both jurisdiction "over their subject matter" and "venue jurisdiction", it is therefore not essential to determine upon which cause of action the jury predicated its verdict, since the jury could properly find that the evidence supported both, since petitioner, as established by the evidence, was engaged in both inter-state and intra-state commerce at the time he was injured, and all the other averments in both actions were identically the same.

The Employers' Liability Act of Kentucky and the Federal Employers' Liability Act are identical in their provisions, excepting that the Federal Act requires "an employment in interstate commerce", while the Kentucky Act requires "an employment in intra-state commerce", as respective elements of the said respective actions.

The statement of facts and arguments contained in respondent's Brief, prompts the petitioner to call this Honorable Court's attention to the outstanding facts and evidence contained in the Record upon the more important issues herein.

SINCE THE JURY'S VERDICT WAS IN FAVOR OF PETITIONER, IT NECESSARILY FOLLOWS THAT THE EVIDENCE ADDUCED ON BEHALF OF PETITIONER, AND INFERENCES TO BE DRAWN THEREFROM, ARE PROPERLY THE DOMINANT EVIDENCE AND INFERENCES to be considered in determining whether the evidence in the Record supports the issues, and the jury's verdict. PETITIONER RESPECTFULLY SUBMITS THAT THE EVIDENCE IN THE RECORD DOES SUPPORT THE CONTENTIONS OF PETITIONER AND THE GENERAL VERDICT OF THE JURY ON HIS BEHALF.

For the sake of brevity, the petitioner will not, at this point in the Reply Brief, unnecessarily repeat the evidence but will point out to this Honorable Court the pertinent facts necessary to a clear understanding of the matters discussed.

Argument.

POINT I.

The respondent's "plea in abatement", by traversing and denying the petitioner's allegation of his complaint respecting his employment in interstate commerce, did not by reason of said traverse thereby deprive the District Court of its properly acquired jurisdiction over the subject matter of petitioner's first cause of action.

Petitioner reaffirms his contentions set forth under Point I of his Brief, pages 10 to 25 inclusive, respecting both the jurisdiction of the District Court over the subject matter of the first cause of action of petitioner's complaint and venue thereof. In addition, the petitioner herewith further submits the within supplemental contentions and authorities in support of the District Court's jurisdiction aforesaid, in reply to respondent's new matter and contentions on this issue, set forth by it, under Point II, pages 21 to 26 inclusive, of its "Brief".

1.

The allegations of petitioner's first paragraph or action of the complaint determined the District Court's jurisdiction over the subject matter thereof.

> *Central of N. J. R. R.* v. *Mills*, 113 U. S. 249, 257;
> *The Fair* v. *Kohler Dye Co.*, 228 U. S. 22, 25.

In the case of *Central of N. J. R. R.* v. *Mills* (*supra*), the rule applicable hereto, and stated by this Honorable Court, is as follows, at page 257 thereof:

> "The jurisdiction of District Courts over the subject matter of a cause of action is determined by the allegations of the complaint."

Petitioner in his first paragraph alleged in substance (R. 2-6), to wit:

> That he was employed as a yard switchman by respondent, an interstate common carrier by railroad;
>
> That on November 29th, 1930, he was caused to be injured;
>
> That his injuries were proximately caused by the negligence, as averred, of the respondent;
>
> That at the time he sustained his injuries he was employed by and engaged with respondent in interstate commerce and transportation;
>
> That he was damaged in the sum of $77,600;
>
> That he brought his action within two years of the time his cause of action arose;

and, by force of said allegations, petitioner stated a cause of action in said first paragraph of his complaint, which arose under a law of the United States, to wit: The Federal Employers' Liability Act, 45 U. S. C. A. 51, *et seq.*

Wherefore, the District Court properly acquired jurisdiction over the subject matter of petitioner's first cause of action in accord with the provisions of the Judicial Code (28 U. S. C. A. 41), since the aforestated allegations in the complaint determined that the subject matter of said First action was a suit of a civil nature at common law, involving more than $3,000.00, AND THAT IT AROSE UNDER A LAW OF THE UNITED STATES.

> Sec. 24, Amended, of the Judicial Code, 28 U. S. C. A. 41.

2.

The respondent filed a pleading wherein it denied and traversed the allegations of petitioner's first cause of action.

An examination of the averments of respondent's pleading (R. 17, 18), and a comparison thereof with the allega-

tions of petitioner's first paragraph of the complaint (R. 3) ESTABLISHES, THAT RESPONDENT'S PLEA IN ABATEMENT, BY REPEATING PETITIONER'S AVERMENTS THEREIN, MERELY DENIED AND TRAVERSED THE ALLEGATIONS SET FORTH IN PETITIONER'S COMPLAINT RESPECTING HIS "EMPLOYMENT IN INTERSTATE COMMERCE", AND FURTHER ESTABLISHES THAT RESPONDENT DID NOT AVER ANY COLLATERAL OR INDEPENDENT FACTS WHICH BY ITS NATURE WOULD ABATE PETITIONER'S FIRST CAUSE OF ACTION.

3.

The respondent's traverse of the petitioner's allegation certainly did not abate the petitioner's action.

The most that can be claimed for said traverse is that it raised an issue with respect to petitioner's allegation of his "employment in interstate commerce".

3a.

Such an issue went to the merits of the action and not to jurisdiction of the subject matter thereof.

That the issue respecting petitioner's "employment in interstate commerce" does not refer to jurisdiction is apparent from Section 24, Amended, of the Judicial Code (28 U. S. C. A. 41), which is the determining source of a Federal District Court's jurisdiction over the subject matter of an action. Nowhere therein has Congress provided that a District Court shall have jurisdiction over the subject matter of an action by reason of an action arising or occurring in "interstate commerce". Said Section 24 of the Judicial Code (*supra*), did however provide that a District Court shall have jurisdiction of an action if "the action is between citizens of different states". It is by reason of that provision, and that provision only, that allegations in a complaint referring to "a diversity of

citizenship" between party litigants refers to the jurisdiction of a District Court over the subject matter of an action. IN THE ABSENCE OF ANY PROVISION IN SECTION 24 OF THE JUDICIAL CODE (*supra*) THAT "AN EMPLOYMENT IN INTERSTATE COMMERCE" SHALL LIKEWISE PROVIDE A DISTRICT COURT WITH JURISDICTION OVER AN ACTION, THE RESPONDENT'S CONTENTION THAT THE PETITIONER'S "EMPLOYMENT IN INTERSTATE COMMERCE" REFERS TO JURISDICTION, IS WITHOUT MERIT AND UNTENABLE.

Section 24 of the Judicial Code (*supra*), does provide that a District Court shall have jurisdiction of an action if the subject matter of the action is one ARISING UNDER A LAW OF THE UNITED STATES.

THE FEDERAL EMPLOYERS' LIABILITY ACT (45 U. S. C. A., Sec. 51, *et seq.*), IS A LAW OF THE UNITED STATES AND IT CREATES A NEW RIGHT OF ACTION, OF WHICH THE REQUIREMENT THAT THE PLAINTIFF EMPLOYEE BE ENGAGED "IN INTERSTATE COMMERCE AT THE TIME HE IS INJURED", IS AN ESSENTIAL INGREDIENT AND ELEMENT OF THE ACTION CREATED BY THE FEDERAL EMPLOYERS' LIABILITY ACT. THE REQUIREMENT IN THE "ACT" THAT "AN ACTION MUST BE COMMENCED WITHIN TWO YEARS FROM THE TIME IT AROSE" IS SIMILARLY AN ELEMENT OF THE ACTION.

Am. R. v. *Coronas* (Porto Rico 1916), 230 F. 545, 144 C. C. A. 599;

Kanneles v. *Great Northern R.* (1922), 186 N. W. 389, 151 Minn. 157;

Carpenter v. *Central Vt. R.*, 107 A. 569, 93 Vt. 357;

Rademaker v. *Flynn Export Co.*, 17 F. (2d) 15.

That the allegation respecting petitioner's "employment in interstate commerce" goes to the merits and not to jurisdiction, is further determined by the following test, to wit:

A. If it goes to the merits, then on a failure of proof thereof, a plaintiff cannot recover under the Federal Em-

ployers' Liability Act, AND HIS FAILURE TO PROVE THAT ALLEGATION PUTS IN MOTION "RES ADJUDICATA" WHICH THEREAFTER PREVENTS A PLAINTIFF FROM PREDICATING HIS ACTION UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT AGAIN IN ANY OTHER COURT. A failure of proof thereof results in a failure of the action under the Federal Employers' Liability Act on its merits.

B. If this allegation goes to jurisdiction, then on failure of proof thereof, all that a court could do therein would be to dismiss the action without prejudice to the plaintiff's right to bring the same action in any other court predicated on the same law, to wit, the Federal Employers' Liability Act.

That petitioner's allegation of his "employment in interstate commerce" goes to the merits and not to the jurisdiction, was confirmed in the case of *Rice* v. *Baltimore O. & R. Co.*, 42 F. (2d) 387, 393, quoted by respondent at page 24 of its Brief in support of its contention, but which to the contrary, does not support its contention but does support the petitioner's contention, wherein (as quoted in p. 24 of Respondent's Brief):

> "The Circuit Court of Appeals for the Sixth Circuit held that:
>
> > 'The judgment should recite that the plaintiff was not engaged in interstate commerce, and for that reason, the case is dismissed * * * WITHOUT PREJUDICE TO A SUIT IN THE PROPER FORUM BASED UPON ANY RIGHTS *OTHER THAN THESE GIVEN BY THE EMPLOYERS' LIABILITY ACT.*'"

Therefore, in the case of *Rice* v. *Baltimore O. & R.* (*supra*), the Circuit Court of Appeals decided that the plaintiff therein, in failing to prove that he was engaged in "interstate commerce" as alleged in his complaint, by

reason thereof cannot again bring his action in any court based upon the Federal Employers' Liability Act. The reason therefore is apparent and is as shown by petitioner to be; that, once having failed to prove the "employment in interstate commerce" allegation, the plaintiff failed to prove an essential element of the action created by the Federal Employers' Liability Act, and which went to the merits of the action and by the rule of *"res adjudicata"* he cannot again try the same action in any other court.

3b.

Respondent by merely traversing an allegation of the complaint which went to the merits of the action, did not by reason thereof either abate the action or deprive the District Court of its properly acquired jurisdiction of the subject matter of the action.

In the case of *The Chesapeake & Ohio Railway Co.* v. *Cockrell*, 232 U. S. 146, this Honorable Court sustains the contention made by petitioner, and denies the respondent's contention which the respondent urges under Point II of its Brief at page 21 thereof, and which contention the same respondent, The Chesapeake & Ohio Railway Co. similarly urged in the *Cockrell* case, *supra*, and was there similarly denied. In said *Cockrell* case, *supra*, this Honorable Court said as follows, at page 150:

> "Rightly understood—the plaintiff's petition charged that the injury and death of the intestate was caused by the negligence of the defendants."

and at pages 150-151 thereof:

> "The railway company's petition for removal (of the action from the State Court to the District Court) did allege that the charge of negligence (all being specifically repeated) were each and all false, untrue and were known by the plaintiff or could

> have been known by the exercise of ordinary diligence to be false and untrue, etc."

and at page 152 thereof:

> "So, when in such a case a resident defendant is joined with a non-resident, the joinder * * * may be shown by a petition for removal to be only a fraudulent device to prevent a removal. BUT THE SHOWING MUST CONSIST OF A STATEMENT OF FACTS RIGHTLY ENGENDERING THAT CONCLUSION. *Merely to traverse the allegations upon which the liability of the resident defendant is rested, or to apply the epithet 'fraudulent' to the joinder, will not suffice.*"

and at page 153 thereof:

> "*The showing (by the defendant's petition for removal) amounted to nothing more than a traverse of the charges of negligence, and this showing manifestly went to the merits of the action as an entirety and not to the joinder.*"

and at pages 153 and 154:

> "We conclude therefore, that the petition for removal was not such as to require the State Court to surrender its jurisdiction."

Applying the principles of law of the *Cockrell* case to this case, it is evident that respondent herein, in its plea in abatement, did not aver any facts or make any claim that petitioner's allegations respecting his "employment in interstate commerce" were fraudulent. Neither does said "plea in abatement" aver facts which petitioner could deny and make issue to respecting an abatement of the action. All that respondent's pleading did was to traverse (by verbatim repetition) the allegation of the petitioner's complaint respecting his "employment in interstate commerce". And, as similarly contended by this Honorable Court in the said *Cockrell* case, the petitioner likewise herein con-

tends that respondent's aforesaid traverse raised an issue which went to the merits of petitioner's action "as an entirety", since the elements of negligence, "an employment in interstate commerce", and "that the action be commenced within two years from the time it arose", are all similarly and equally essential elements of the action created by the Federal Employers' Liability Act, and all these elements go to the merits of the action aforesaid "as an entirety".

C. & O. Ry. Co. v. Cockrell, 232 U. S. 146;
Am. R. v. Coronas, 230 F. 545;
Kannelos v. G. N. R. Co., 186 N. W. 389, 151 Minn. 157;
Carpenter v. C. Vt. R. Co., 107 A. 569, 93 Vt. 357;
Rademaker v. Flynn Export Co., 17 F. (2d) 15.

And, as held in the Cockrell case, supra, this mere traverse did not require the District Court to surrender its jurisdiction.

4.

Respondent's pleading as a demurrer to the jurisdiction failed of its purpose.

The respondent at page 24 of its Brief, refers to the case of *Aldredge v. Baltimore & O. R. Co.*, 20 F. (2d) 655, in support of its contentions. Respondent, however, failed to set out in its Brief all of the pertinent facts in said *Aldredge* case. An examination of that case discloses the following, as stated by the Circuit Court of Appeals therein at page 658:

> "There was thus presented to the Federal Court on the motion to remand, the question WHETHER ON THE UNDISPUTED FACTS PLAINTIFF WAS ENGAGED IN INTERSTATE COMMERCE AT THE TIME OF THE ACCIDENT."

Here, in this the *Moore* case, a question is not presented on undisputed facts; on the contrary, respondent by its Traverse and Denial disputes the facts alleged by petitioner.

In the *Aldredge* case (*supra*), page 658, the Court said:

> "*Defendant did not traverse the allegations in the complaint* * * *. These allegations remained uncontroverted. The specific allegations control* * * *."

And that Court further held that the facts recited in the plaintiff's complaint failed to aver and establish sufficiently that he was engaged in "interstate commerce" at the time he was injured, and it therefore failed to aver an action under the FEDERAL EMPLOYERS' LIABILITY ACT. Applying the same test to this, the *Moore* case, the facts as to what petitioner was doing at the time he was injured are alleged in the first paragraph of his complaint (R. 3), AND THE FACTS AVERRED BY PETITIONER THEREIN UNQUESTIONABLY AND UNDISPUTABLY ESTABLISHES AND DETERMINES THAT MOORE, THE PETITIONER HEREIN, WAS ENGAGED IN "INTERSTATE COMMERCE AND TRANSPORTATION" AT THE TIME HE SUSTAINED HIS INJURY.

The pleading of the respondent, acting as a "demurrer to the District Court's jurisdiction", tested the sufficiency of the allegations of petitioner's complaint, as was done in the *Aldredge* case (*supra*). Since, by the sufficiency of the allegations his complaint established that he was employed in interstate commerce, it follows that the District Court herein properly overruled the respondent's "demurrer to its jurisdiction".

In the case of *Mahr* v. *Union Pacific Railway Co.*, 140 Fed. 921, the Court held in Syllabus 3 thereof, as follows:

> "An averment in a motion by a defendant to

> quash the service, 'THAT THE SUBJECT MATTER OF THE ACTION WAS NOT AND NEVER HAS BEEN AND IS NOT NOW WITHIN SAID STATE' * * * is equivalent to a 'demurrer' that the Court has no jurisdiction of the subject matter of the action."

To the same effect is the case of *Elliot* v. *Lawhead*, 43 Ohio State, 171, 176 (1 N. E. 577), in which case, cited in 4 Corpus Juris 1334, the Court therein held as follows:

> "This motion assigns two reasons * * *. Second: the Court had no jurisdiction over the subject matter. THIS LAST GROUND WAS IN THE NATURE OF A DEMURRER TO THE JURISDICTION OF THE COURT."

The respondent filed a pleading which it named a "plea in abatement". As stated by the Court in the case of *Massachusetts Bonding and Insurance Co.* v. *Bridge Co.*, 37 F. (2d) 695, in effect

> "the character of a pleading is determinable from its substance and not from its form or labelling."

So here, since respondent's "plea in abatement" did not set up any independent or collateral facts in abatement of petitioner's action, it was not a plea in abatement in fact, but was only such by its label. As a "demurrer to the District Court's jurisdiction", it failed. By its traverse of petitioner's allegation it partook of the function of an "Answer of Denial to the Merits", since it thereby undertook to raise an issue of fact going to the merits of the action, which is the function of an "Answer of Denial to the Merits" and not the function of a "plea in abatement". Petitioner demurred to this irregular pleading. The District Court sustained the petitioner's demurrer thereto and overruled the respondent's pleading. By its overruling of same, the District Court thereby required the respondent to file its pleading in the proper form and procedure and to label it by its correct name if respondent desired it to

function as an "Answer to the Merits". This the respondent did by re-filing it in the form of an "Answer of General Denial" to the merits of petitioner's first cause of action (R. 20). Thereafter, on the trial of the general issues raised by respondent's aforesaid "Answer of General Denial", the District Court submitted the issues of fact respecting petitioner's "employment in interstate commerce" to the jury for its determination (R. 101).

Wherefore, the action of the District Court is without error wherein it overruled respondent's so-called "plea in abatement" and refused, because of the filing of said plea, to surrender its properly acquired jurisdiction.

POINT II.

A

The District Court properly acquired venue jurisdiction over the person of the respondent as respects the petitioner's first cause of action, by force of Section 6, the applicable venue provision of the Federal Employers' Liability Act (45 U. S. C. A. 56).

Petitioner in the first cause of action of his complaint fully alleged and averred his said action under the Federal Employers' Liability Act (R. 2-6), a law of the United States.

Wherefore, by reason of the aforesaid allegations of his complaint, the District Court properly acquired jurisdiction over the subject matter of said first cause of action.

C. R. R. of N. J. v. Mills, 113 U. S. 249, 257;
The Fair v. Kohler Dye Co., 228 U. S. 22, 25.

The petitioner's first cause of action being an action arising under the Federal Employers' Liability Act, the

venue provision provided by said Act, to wit, Section 6, Amended, 45 U. S. C. A. 56, governed the petitioner's first cause of action. That venue provision of the Federal Employers' Liability Act determined that the District Court herein had jurisdiction over the person of the respondent as respects said first cause of action.

Petitioner by reference herein, re-incorporates and re-affirms the authorities and arguments appearing in his Brief, pages 3 to 4 thereof, and pages 10 to 25 inclusive thereof, in support of his contention that the venue provision of the Federal Employers' Liability Act was the determining venue provision applicable to petitioner's first cause of action.

B

Respondent entered its general appearance to petitioner's first cause of action, and by reason thereof, conferred upon the District Court venue jurisdiction with respect to said first cause of action.

As established by petitioner in his Brief and reaffirmed under Point II, "A" herein, the District Court acquired venue jurisdiction over the first cause of action by force of the applicable venue provision, to wit, Section 6 of the Federal Employers' Liability Act (45 U. S. C. A. 56). Nevertheless, and *in addition thereto, petitioner further contends that the respondent voluntarily entered its general appearance to said first cause of action*, and by reason thereof, it voluntarily conferred upon the District Court appropriate venue jurisdiction over its person as respects said first cause of action.

RESPONDENT ENTERED ITS GENERAL APPEARANCE TO THE FIRST CAUSE OF ACTION BY THE FILING OF ITS PLEADING

WHEREIN IT CHALLENGED THE JURISDICTION OF THE DISTRICT COURT OVER THE SUBJECT MATTER OF THE FIRST CAUSE OF ACTION, BY AVERRING IN SAID PLEADING, as follows, to wit:

(R. 17-18) "First: The Chesapeake and Ohio Railway Company, the defendant in the above entitled cause, appearing specially and for the purpose of this answer only, by way of amended answer in abatement to Paragraph I of plaintiff's complaint herein, says:

That on November 29, 1930, and at the time of the alleged grievances complained of in said paragraph of complaint, the plaintiff was not employed by defendant in commerce between any of the several states or territories, or between any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, NOR WAS HE IN ANY RESPECT EMPLOYED BY OR ENGAGED IN INTERSTATE COMMERCE AS THEREIN ALLEGED, nor was he assisting in switching freight cars from off the Shop Track easterly and over and onto the defendant's classifying tracks in the yards referred to in said paragraph of complaint for any of the following purposes to wit: placing cars into trains so that said cars could continue any original movements in Interstate Commerce which were temporarily interrupted at said yard for the purpose of making 'running' repairs to said cars; placing cars into trains for the purpose of moving said cars from Russell, Kentucky, to points in the State of West Virginia, Virginia and other states of the United States; placing cars in trains for the purpose of continuing the movements of said cars in Interstate Commerce from Ohio, Illinois, Indiana and other states of the United States to their destination in the State of Kentucky; clearing the Shop Track Number 2 *referred to in said paragraph of complaint* of the cars therein referred to in order that plaintiff could assist his

crew in the movement of other cars from Track Number 18 in said yard, *referred to in said paragraph of complaint,* to said Shop Track Number 2 immediately following upon the clearing of the cars off of the Shop Track as aforesaid, for the purpose of making of running repairs to said cars on said Number 18 track in order that said cars could continue any original movement in Interstate Commerce from Ohio, Indiana, Illinois, Virginia, West Virginia, Kentucky or other states of the United States to their destinations, and THAT BY REASON THEREOF THIS COURT HAS NO JURISDICTION TO HEAR AND DETERMINE THIS ACTION pursuant to the Act of Congress of the United States approved April 22, 1908, and Amendments thereto, and which Act is commonly known as the Federal Employers' Liability Act.

It further says that at all times mentioned in said paragraph of complaint it was and now is as therein alleged a corporation duly organized and acting as such under and by virtue of the laws of the State of Virginia, and it further says that during all said times it was and now is an inhabitant of the Eastern District of Virginia, and that in so far as the action declared upon in said paragraph is brought against the defendant or arises under or by virtue of the Act of the Congress of the United States known as the Safety Appliance Acts and the Rules and Orders lawfully promulgated thereunder by the United States Interstate Commerce Commission, the same cannot be brought in any district court against this defendant by any original process or proceeding in any other district that said Eastern District of Virginia whereof it is an inhabitant as aforesaid.

WHEREFORE, IT SAYS THAT THIS COURT HAS NO JURISDICTION OVER THIS ACTION or the person of this defendant and it prays that the same shall abate and be dismissed."

RESPONDENT BY AVERRING in said pleading (R. 17, 18) that

> *"Plaintiff was not employed by defendant in commerce between any of the several states,—nor was he in any respect employed or engaged in interstate commerce as therein alleged,—and that by reason thereof this Court has no jurisdiction to hear and determine this action.—Wherefore, it says that this court has no jurisdiction over this action"*,

thereby CHALLENGED THE DISTRICT COURT'S JURISDICTION over the subject matter of the first cause of action, and by force thereof, respondent entered its general appearance to said first cause of action.

> Corpus Juris, Sec. 27, Vol. 4, page 1333;
> *Fitzgerald Construction Co.* v. *Fitzgerald*, 137 U. S. 98, 34 Law Ed. 608;
> *Mahr* v. *Union Pacific Railway Co.*, 140 Fed. 921;
> *McComb et al.* v. *U. S. Housing Corp.*, 264 Fed. 589, 590.

Corpus Juris, Sec. 27 (*supra*), states the applicable rule of law as follows, to wit:

> "A party makes a general appearance by objecting to the jurisdiction of the Court over the subject matter of the action, whether the objection is made by a motion or by a formal pleading."

In *Fitzgerald Construction Co.* v. *Fitzgerald* (*supra*) the defendant filed a demurrer to the petition and asserted therein:

> (P. 103) "That the District Court of Lancaster County, Nebraska, never had or acquired any jurisdiction of the defendant, and this Court has no

jurisdiction to hear, try and determine the matters and things in controversy herein,"

and at page 105:

"The question as raised went deeper than objection to service merely, AND ATTACKED THE POWER OF THE COURT TO PROCEED AT ALL,"

and at page 106:

"By the amendment to its Answer, its plea and motions, the defendant insisted that the Court had no jurisdiction to proceed, and thereby declined to stand upon the objection to the service AND SUBMITTED ITSELF TO THE DECISION OF THE COURT IN RESPECT TO JURISDICTION OVER THE SUBJECT MATTER."

In the case of *Mahr* v. *Union Pacific Railway Co.* (*supra*), the Court held, in Syllabus 3, as follows:

"An AVERMENT in a motion by a defendant to quash the service, 'THAT THE SUBJECT MATTER OF THE ACTION "WAS NOT AND NEVER HAS BEEN AND IS NOT NOW WITHIN SAID STATE"' where the action is brought, is EQUIVALENT TO A 'DEMURRER THAT THE COURT HAS NO JURISDICTION OF THE SUBJECT MATTER OF THE ACTION' and the filing of such motion in a Federal Court in that state CONSTITUTES A GENERAL APPEARANCE."

In the case of *McComb et al.* v. *U. S. Housing Corp.* (*supra*), the Court stated, at page 591, as follows:

"The defendant entered a special appearance and moved to quash the aforesaid order for the reason, amongst others, (4) that the suit, though nominally against the defendants herein, is in law a suit against the United States and consequently that the Court is and has been without jurisdiction",

and the Court in the *McComb* case (*supra*) construed this

averment as a challenge of its jurisdiction over the subject matter of the action and held that said averment in said pleading constituted a general appearance by the defendant to the action.

IT IS THEREFORE EVIDENT THAT RESPONDENT ENTERED ITS GENERAL APPEARANCE TO PETITIONER'S FIRST CAUSE OF ACTION WHEN, BY ITS PLEADING, IT CHALLENGED THE JURISDICTION OF THE DISTRICT COURT OVER THE SUBJECT MATTER OF THE FIRST CAUSE OF ACTION, AND BY FORCE OF ITS GENERAL APPEARANCE, RESPONDENT CONFERRED UPON THE DISTRICT COURT APPROPRIATE VENUE JURISDICTION TO TRY AND DETERMINE SAID FIRST CAUSE OF ACTION.

That respondent in the same pleading objected to the District Court's jurisdiction over its person, did not by reason thereof, alter the effect of its general appearance aforesaid.

In the case of *Fitzgerald Construction Company* v. *Fitzgerald*, 137 U. S. 98, 34 Law Ed. 608, this Honorable Court held, in Syllabus 2 thereof, as follows, to wit:

> "In such case, objection to jurisdiction over the person to be availing must not be raised in connection with denial of jurisdiction over the subject matter."
>
> (P. 106) "There was no action on its part confined solely to the purpose of questioning the jurisdiction over the person. That such jurisdiction resulted under the circumstances, admits of no doubt."

In the case of *Mahr* v. *Union Pacific Railway Co.*, 140 Fed. 921, the Court held, in Syllabus 1 thereof, to wit:

> "Whenever a litigant appears to deny jurisdiction over his person, he must confine himself to that particular branch of jurisdiction, and if in his motion, he also challenges the jurisdiction of the Court over the subject matter of the action, he waives

want of service and enters a general appearance, NOTWITHSTANDING ANY WORDS OF LIMITATION IN HIS MOTION."

Syllabus 2: "The right of a defendant in a Federal Court to be sued in the District of his residence, is one which he may waive and which is waived by a general appearance."

In the case of *McComb et al.* v. *U. S. Housing Corp.*, 264 Fed. 589, the Court held, in Syllabus 2 thereof, as follows, to wit:

"APPEARANCE: Only jurisdiction over the person and not over the cause may be raised by special appearance. The object of a special appearance is to enable a defendant to raise the question of the jurisdiction of the Court over the person of the defendant, and an objection to jurisdiction of the cause may not be raised on a special appearance."

In the case of *Elliott* v. *Lawhead*, 43 Ohio St. 171, 176, 1 N. E. 577, which case is cited in 4 Corpus Juris, 1334, the Court said:

"THIS MOTION ASSIGNS two reasons why it should be granted: First—want of legal and proper service; and Second—Because THE COURT HAD NO JURISDICTION OF THE SUBJECT MATTER. THIS LAST GROUND WAS IN THE NATURE OF A DEMURRER TO THE JURISDICTION OF THE COURT AND WAS IN ITSELF AN APPEARANCE IN THE CASE."

The respondent, by incorporating in its pleading—both an objection to "jurisdiction over its person" and an "objection to jurisdiction over the subject matter of the action", thereby waived its objection to the District Court's "jurisdiction over its person", and by force of its objection to the District Court's "jurisdiction over the subject matter of said first cause of action" it entered its general appearance to said first cause of action.

THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA ACQUIRED JURISDICTION "OVER THE PERSON" OF THE DEFENDANT WITH RESPECT TO THE FIRST CAUSE OF ACTION, FIRST: BY FORCE OF THE MANDATE OF SECTION 6, THE APPLICABLE VENUE PROVISION OF THE FEDERAL EMPLOYERS' LIABILITY ACT (45 U. S. C. A. 56),

AND, OR SECOND: BY FORCE OF THE GENERAL APPEARANCE ENTERED BY RESPONDENT TO PETITIONER'S FIRST CAUSE OF ACTION, SO ENTERED BY IT WHEN IN ITS PLEADING AFORESAID IT CHALLENGED THE JURISDICTION OF THE DISTRICT COURT OVER THE SUBJECT MATTER OF THE SAID FIRST CAUSE OF ACTION.

WHEREFORE, NO ERROR WAS COMMITTED BY THE DISTRICT COURT IN ITS ASSUMPTION OF *VENUE JURISDICTION OVER SAID* FIRST CAUSE OF ACTION.

POINT III.

Respondent entered its general appearance to petitioner's second cause of action, and by reason thereof conferred upon the District Court appropriate venue jurisdiction with respect to said second cause of action.

In addition and supplementary to his Brief, pages 26 to 29, petitioner herewith further submits his contentions and authorities in support of the District Court's venue jurisdiction over the said second cause of action in reply to respondent's new matter and contentions on this issue set forth by it under Point III, pages 26 to 35 inclusive, of its "Brief".

As admitted by respondent's brief, on page 31 thereof, petitioner invoked the jurisdiction of the District Court over the second paragraph or cause of action therein averred upon the ground of a diversity of citizenship, by

alleging therein that petitioner is a citizen of Indiana and that respondent is a citizen of Virginia.

The allegation of the petitioner's complaint, by its averment of a diversity of citizenship between the parties plaintiff and defendant, conferred upon the District Court jurisdiction to hear and determine the subject matter of the second cause of action, which, as was further averred in the complaint, was a suit of a civil nature at common law and involved more than $3,000 exclusive of costs and interest.

The Judicial Code, Section 24, amended (28 U. S. C. A. 41), provides, to wit:

> "ORIGINAL JURISDICTION: District Courts shall have original jurisdiction as follows: First: Of all suits of a civil nature, at common law, between citizens of different states, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00."

In the case of *Central of New Jersey Railroad Co.* v. *Mills*, 113 U. S. 249, 257, this Honorable Court held that:

> "Jurisdiction of District Courts over the SUBJECT MATTER OF A CAUSE OF ACTION IS DETERMINED BY THE ALLEGATIONS OF THE COMPLAINT."

And, similarly, this rule of law was affirmed and followed in *Fair* v. *Kohler Dye Co.*, 228 U. S. 22, 25.

Wherefore, *the allegations* in the second paragraph of the complaint *respecting petitioner's Indiana citizenship and the existence of a diversity of citizenship* between the parties, *solely determined and concerned the District Court's jurisdiction over the subject matter of the action*, and *did not relate to or concern venue jurisdiction*, that is, jurisdiction over the person of the respondent.

Respondent filed a pleading wherein it challenged the

jurisdiction of the District Court over the subject matter of said second cause of action by averring in said pleading, as follows, to wit:

(R. 14) "Second. The Chesapeake and Ohio Railway company, the defendant in the above entitled cause, appearing specially and for the purpose of this answer only, by way of answer in abatement to Paragraph II of plaintiff's complaint herein, says:

That it admits that at all times mentioned in said paragraph of complaint it was and now is a corporation duly organized and acting as such under and by virtue of the laws of the State of Virginia, and that during such time it was and now is a citizen of the state of Virginia, BUT IT DENIES THAT AT THE TIME OF THE COMMENCEMENT OF THIS ACTION THE PLAINTIFF WAS OR NOW IS a resident of the City of Fort Wayne, in Allen County in the State of Indiana, or of the Northern District of Indiana, or the Fort Wayne Division therein, or A CITIZEN OF THE STATE OF INDIANA.

It further says that during all said times it was and now is an inhabitant of the Eastern District of Virginia, and that the action declared upon in said paragraph of complaint being brought against the defendant and arising under and by virtue of the Act of the Congress of the United States commonly known as the Safety Appliance Acts and, the Rules and Orders promulgated by the Interstate Commerce Commission of the United States, the same cannot be brought in any district court against this defendant by any original process or proceeding in any other district than said Eastern District of Virginia whereof it is an inhabitant as aforesaid.

WHEREFORE IT SAYS THAT THIS COURT HAS NO JURISDICTION OVER THIS ACTION or *the person of this defendant* and it prays that the same shall abate and be dismissed."

1.

Respondent, by averring in said pleading that it "Denies that at the time of the commencement of this action the plaintiff was or now is a citizen of the State of Indiana and it says that this Court (the District Court) has no jurisdiction over this action", thereby challenged the District Court's jurisdiction over the subject matter of the second cause of action, and by force thereof respondent entered its general appearance to said second cause of action.

Corpus Juris, Sec. 27, Vol. 4, page 1333;
Fitzgerald Construction Co. v. *Fitzgerald*, 137 U. S. 98, 34 Law Ed. 608;
Mahr v. *Union Pacific Railway Co.*, 140 Fed. 921;
McComb et al. v. *U. S. Housing Corp.*, 264 Fed. 589.

Corpus Juris, Sec. 27 (*supra*), states the applicable rule of law as follows, to wit:

> "A party makes a general appearance by objecting to the jurisdiction of the Court over the subject matter of the action, whether the objection is made by a motion or by a formal pleading."

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> (P. 103) "That the District Court of Lancaster County, Nebraska, never had or acquired any jurisdiction of the defendant, and this Court has no jurisdiction to hear, try and determine the matters and things in controversy herein,"

and at page 105,

> "The question as raised went deeper than objec-

> tion to service merely, AND ATTACKED THE POWER OF THE COURT TO PROCEED AT ALL;"

and at page 106,

> "By the amendment to its Answer, its plea and motions, the defendant insisted that the Court had no jurisdiction to proceed, and thereby declined to stand upon the objection to the service AND SUBMITTED ITSELF TO THE DECISION OF THE COURT IN RESPECT TO JURISDICTION OVER THE SUBJECT MATTER."

In the case of *Mahr* v. *Union Pacific Railway Co.* (*supra*), 140 Fed. 921, the Court held, in Syllabus 3, as follows:

> "*An averment* in a motion by a defendant to quash the service, 'THAT THE SUBJECT MATTER OF THE ACTION *was not and never has been and is not now within said state*', where the action is brought, *is equivalent to a 'demurrer* that THE COURT HAS NO JURISDICTION OF THE SUBJECT MATTER OF THE ACTION' *and* the filing of such motion in a Federal Court in that state *constitutes a general appearance.*"

In the case of *McComb et al.* v. *U. S. Housing Corp.* (*supra*), 264 Fed. 589, the Court stated, at page 591, as follows:

> "The defendant entered a special appearance and moved to quash the aforesaid order for the reason, amongst others, (4) that the suit, though nominally against the defendants herein, is in law a suit against the United States and consequently that the Court is and has been without jurisdiction."

and the Court construed this averment as a challenge of its jurisdiction over the subject matter of the action and held that said averment in said pleading constituted a general appearance by the defendant to the action.

It is therefore evident that respondent entered its general appearance to petitioner's second cause of action when, by its pleading, it challenged the jurisdiction of the District Court over the subject matter of the second cause of action, and by force of its general appearance, respondent conferred upon the District Court appropriate venue jurisdiction to try and determine said second cause of action.

2.

That respondent in the same pleading objected to the District Court's jurisdiction over its person, did not, by reason thereof, alter the effect of its general appearance aforesaid.

Fitzgerald Construction Co. v. *Fitzgerald*, 137 U. S. 98, 34 Law Ed. 608;
Mahr v. *Union Pacific Railway Co.*, 140 Fed. 921;
McComb et al. v. *U. S. Housing Corp.*, 264 Fed. 589;
Elliott v. *Lawhead*, 43 Ohio State 171, 176 (1 N. E. 577).

In the case of *Fitzgerald Construction Company* v. *Fitzgerald* (*supra*), this Honorable Court held, in Syllabus 2 thereof, as follows, to wit:

> "In such case, objection to jurisdiction over the person to be availing must not be raised in connection with denial of jurisdiction over the subject matter."
>
> (P. 106) "there was no action on its part confined solely to the purpose of questioning the jurisdiction over the person. That such jurisdiction resulted under the circumstances, admits of no doubt."

In the case of *Mahr* v. *Union Pacific Railway Co.* (*supra*), the Court held, in Syllabus 1 thereof, to wit:

> "Whenever a litigant appears to deny jurisdiction over his person, he must confine himself to

that particular branch of jurisdiction, and if in his motion, he also challenges the jurisdiction of the Court over the subject matter of the action, he waives want of service and enters a general appearance, NOTWITHSTANDING ANY WORDS OF LIMITATION IN HIS MOTION."

Syllabus 2: "The right of a defendant in a Federal Court to be sued in the District of his respondents, is one which he may waive and which is waived by a general appearance."

In the case of *McComb et al.* v. *U. S. Housing Corp.* (*supra*), the Court held, in Syllabus 2 thereof, as follows, to wit:

"APPEARANCE: Only jurisdiction over the person and not over the cause may be raised by special appearance. The object of a special appearance is to enable a defendant to raise the question of the jurisdiction of the Court over the person of the defendant, and an objection to the jurisdiction of the cause may not be raised on a special appearance."

In the case of *Elliott* v. *Lawhead*, 43 Ohio State 171, 176 (1 N. E. 577) (*supra*), which case is cited in 4 Corpus Juris, 1334, the Court said:

"*This motion assigns* two reasons why it should be granted: First: want of legal and proper service; and *Second*: Because *the Court had no jurisdiction of the subject matter. This last ground was in the nature of a demurrer to the jurisdiction of the Court and was in itself an appearance in the case.*"

Wherefore, the respondent, by incorporating in its pleading both an objection to "jurisdiction over its person" and an objection to "jurisdiction over the subject matter of the action", thereby waived its objection to the District Court's jurisdiction "over its person", and by force of its objection

to the District Court's "jurisdiction over the subject matter of said second cause of action", it entered its general appearance to said second cause of action.

3.

Respondent cannot change its general appearance into a special appearance by mere words of limitation in its pleading, if by the substance of the pleading a general appearance is entered to the action.

Massachusetts Bonding and Insurance Co. v. *Concrete Steel Bridge Co.*, 37 Fed. (2d) 695; *Mahr* v. *Union Pacific Railway Co.*, 140 Fed. 921.

In the case of *Massachusetts Bonding and Insurance Co.* v. *Concrete Steel Bridge Co.* (*supra*), at page 701, the Court said, in substance:

> "Whether an appearance is general or special does not depend on the form of the pleading filed but on its substance."

And, in the case of *Mahr* v. *Union Pacific Railway Co.* (*supra*), the Court held, in Syllabus 1:

> "* * * if in his motion he also challenges the jurisdiction of the Court over the subject matter of the action, he * * * enters a general appearance notwithstanding any words of limitation in his motion."

4.

Respondent also recognized the second cause of action as in court and voluntarily submitted its person to the District Court's jurisdiction.

Respondent, as aforesaid in its pleading, specifically denied petitioner's allegation that he was a citizen of

Indiana and, by force thereof, denied his allegation respecting the diversity of citizenship of the parties. This denial by respondent raised an issue of fact, respecting the diversity of citizenship of the parties, which issue as aforesaid was directed to and challenged the jurisdiction of the District Court over the subject matter of the action. The respondent, in raising this issue by its pleading, thereby submitted itself to the District Court to render its decision respecting its jurisdiction over the subject matter of the action. This the District Court did in a preliminary trial before the trial of the general issues, as the Record, page 29, indicates, to wit:

> (R. 29) "The defendant, to maintain the issues joined under its plea in abatement, offered and introduced the testimony of the witnesses and documentary evidence hereinafter mentioned, which testimony by deposition or otherwise, and on direct, cross and re-direct examination, together with such documentary evidence in condensed and narrative form, is as follows:
>
> 'DEFENDANT'S (Respondent here) EVIDENCE':
>
> DEFENDANT'S EXHIBIT 1. The deposition of MINTA A. MOORE (R. 29-30).
>
> DEFENDANT'S EXHIBIT 2-A: The deposition of LEE MOORE (R. 30-31).
>
> DEFENDANT'S EXHIBIT 2-B: The deposition of MRS. IDA LEWIS (R. 31-32).
>
> DEFENDANT'S EXHIBIT 5 : To wit:
>
> A Certificate of the Clerk of the Corporation Commission of the State of Virginia, respecting the state in which the respondent corporation was incorporated" (R. 33).

These witnesses and their evidence the respondent voluntarily produced and submitted on its behalf at this preliminary trial. The petitioner produced the testimony of

his witnesses and documentary evidence on this issue, and respondent's counsel further participated in the preliminary trial aforesaid, by cross-examining petitioner's witnesses (R. 34, 35 and 36).

The District Court thereupon rendered its decision on said evidence adduced by both parties herein and issue as follows, to wit:

> (R. 36, 37) "The Court now finds that the plaintiff is a citizen of the State of Indiana and a resident of the City of Fort Wayne, Allen County, Indiana, and finds against the defendant on its second paragraph of its plea in abatement, which is addressed to the second paragraph of the complaint."

WHEREFORE, respondent by voluntarily adducing its evidence and participating in the preliminary trial of the aforesaid issue which it, by its pleading raised, thereby voluntarily submitted its person to the decision of the District Court respecting its jurisdiction over the subject matter of the second cause of action. By force thereof, respondent recognized the second cause of action as in court, entered its general appearance, and impliedly agreed to be bound by the decision of the District Court respecting said issue and its jurisdiction over the subject matter of the second cause of action. The District Court having decided that issue against the respondent, the respondent is bound by the District Court's decision aforesaid.

To permit the respondent to now deny the venue jurisdiction of the District Court over the second cause of action, in the face of respondent's aforesaid voluntary acts and facts, would thereby permit the respondent to repudiate the District Court's decision aforesaid, after the respondent discovered that the District Court's decision was not in its favor. Respondent by its pleading raised the aforesaid issue and took a chance that the District

Court's decision would be in its favor. Having failed therein, respondent now seeks to set the judgment aside on the ground that it never had been in court at all despite its aforesaid acts to the contrary. To permit the respondent to prevail in its aforesaid contention would thereby permit it by a repudiation of its aforesaid acts, to take an undue advantage of the District Court's Federal powers and jurisdiction, which said District Court properly exercised. THIS THE RESPONDENT SHOULD NOT BE PERMITTED TO DO.

Petitioner's contention is concisely set forth in 4 Corpus Juris, page 1333, as follows, to wit:

> "Broadly stated, any action on the part of a defendant, except to object to the jurisdiction over his person, which recognizes the case as in Court, will constitute a general appearance."

And Corpus Juris (*supra*) further cites as the reason for the rule, the case of *Swecker* v. *Reynolds*, 246 Pa. 197, 202; 92 A. 76, wherein the Court said:

> "It is obviously just and fair that if a party wishes to insist on the objection that he is not in Court, he must keep out for all purposes except to make that objection. *THE REASONABLENESS OF THE RULE IS APPARENT. WITHOUT IT IT WOULD RESULT THAT A DEFENDANT COULD TAKE A CHANCE ON THE TRIAL OF THE MERITS OF THE CASE, AND FAILING THEREIN, HE COULD SET THE JUDGMENT ASIDE ON THE GROUND THAT HE HAD NEVER BEEN IN COURT AT ALL.*"

In the case of *Fitzgerald Construction Company* v. *Fitzgerald* (*supra*), 137 U. S. 98, 34 Law Ed. 608, this Honorable Court held, in Syllabus 3:

> "The defendant having denied the power of the Court to proceed at all, and upon decision against

> it, having joined issue and gone to trial on the merits, as jurisdiction existed over the subject matter, it was properly maintained over the person, even though the service on the person might have been set aside."

In the case of *Massachusetts Bonding and Insurance Co.* v. *Concrete Steel Bridge Co.*, 37 Fed. (2d) 695 (*supra*), Circuit Court of Appeals, Fourth Circuit (1930), the Court held, in Syllabus 9:

> "APPEARANCE: Any action of defendant recognizing case as in Court, except to object to jurisdiction over his person, constitutes a general appearance."

Respondent refers to the general Federal Venue Law, to wit, Section 51 of the Judicial Code (28 U. S. C. A. 112), and argues under Point III, pages 26 to 35 inclusive in its Brief, that the applicable venue provision of said Judicial Code to petitioner's second cause of action limits the institution of the suit thereof to the district of the respondent's inhabitancy, to wit, Virginia.

To respondent's contention aforesaid PETITIONER REPLIES THAT THE DISTRICT COURT ACQUIRED VENUE JURISDICTION INDEPENDENT OF SAID SECTION 51 OF THE JUDICIAL CODE AS RESPECTS THE SECOND CAUSE OF ACTION, BY REASON OF THE GENERAL APPEARANCE AFORESAID ENTERED BY RESPONDENT TO SAID SECOND CAUSE OF ACTION.

As stated by this Honorable Court, in the case of *St. L. & S. Francisco R. R.* v. *McBride*, 141 U. S. 127:

> "the right of defendant to insist upon suit against him being brought in the district whereof he is an inhabitant is a personal privilege which he may waive, * * *",

and again as follows therein:

> "The exemption from being sued in the wrong district may be waived by appearing generally * * *."

Fitzgerald Construction Co. v. *Fitzgerald* (*supra*), 137 U. S. 98;
Mahr v. *Union Pacific Railway Co.* (*supra*), 140 Fed. 921.

In the case of *Mahr* v. *Union Pacific Railway Co.* (*supra*), the Court said at Syllabus 2 thereof:

> *"The right of a defendant in a Federal Court to be sued in the district of his residence is one which he may waive and which is waived by a general appearance."*

McComb v. *U. S. Housing Corporation* (*supra*), 264 Fed. 589, 590;
4 Corpus Juris 1333, Section 27 (*supra*).

Wherefore, for the reasons and on the authorities cited by petitioner as set forth in both his Brief and this Reply Brief, petitioner submits that NO ERROR WAS COMMITTED BY THE DISTRICT COURT IN ASSUMING VENUE JURISDICTION OVER THE SAID SECOND CAUSE OF ACTION.

POINT IV.

The evidence established the allegations of petitioner's first cause of action that "he was engaged in interstate commerce and transportation at the time he was injured", and by reason thereof the overruling by the District Court of the respondent's motion "for a directed verdict on this issue" made by respondent at the close of all the evidence, is without error.

The pertinent and outstanding evidence, establishing the petitioner's engagement in "interstate commerce and transportation", is concisely set forth in Petitioner's Brief at pages 10 to 16 inclusive thereof. For the sake of brevity and to avoid repetition petitioner refers to said evidence

and adopts it herein as though fully re-written. Petitioner re-affirms that said evidence credibly and substantially shows that he was engaged in "interstate commerce and transportation" at the time he sustained his injury.

The cars that petitioner's work was concerned with at the time he was injured and which were then being transported by respondent in "interstate commerce" were, Car C & O 61355 a loaded sand car, and, Cars H V 21342 and C & O 33555 which were empty cars.

Petitioner challenges the respondent's statement appearing in its Brief at page 36 thereof, wherein it says:

> "Plaintiff was engaged in the switching of empty coal cars in a terminal yard or distribution point where they had been gathered together. The interstate character of any movement from other states had terminated when they had arrived at their stopping point in the yards and had been placed on the storage or repair tracks"

and petitioner avers that the statement of respondent in these premises is contrary to and not supported by the credible and substantial evidence in the Record.[3]

THE EVIDENCE ESTABLISHED THAT PETITIONER WAS ENGAGED IN INTERSTATE COMMERCE AT THE TIME HE WAS INJURED BECAUSE OF THE CONNECTION OF HIS WORK WITH THE MOVEMENT OF CAR C. & O. 61355 IN INTERSTATE TRANSPORTATION. THIS CAR, WHILE AT RESPONDENT'S RAILROAD YARD AT RUSSELL, KENTUCKY, HAD NOT TERMINATED ITS INTERSTATE MOVEMENT BUT WAS STILL EN ROUTE IN INTERSTATE COMMERCE AND TRANSPORTATION FROM VAUGES, OHIO, TO SURVEYOR, WEST VIRGINIA. At Russell, Kentucky, the interstate movement of this car had been temporarily interrupted for "light running repairs". Upon the completion of that work, which took three-quarters of an hour (R. 47), the car was ready to resume its interstate trip. AT THE

TIME PETITIONER WAS INJURED THE PETITIONER WAS ASSISTING HIS CREW TO MOVE THIS CAR IN SAID YARD TO A TRACK FROM WHICH IT WAS LATER TO BE TAKEN AND PLACED IN A TRAIN EN ROUTE TO ITS DESTINATION, TO WIT, SURVEYOR, WEST VIRGINIA.

(1)

Respondent did not dispute the interstate character of this car while in the Russell, Kentucky yard, the only issue between respondent and petitioner in reference to this Car C & O 61355 was with respect to its presence amongst the cars with which petitioner's work was concerned at the time he was injured.

THE PRESENCE OF THIS CAR AMONG SAID CARS UNQUESTIONABLY ESTABLISHES THE PETITIONER'S EMPLOYMENT IN "INTERSTATE COMMERCE".

That Car C. & O. 61355 was present in the "cut" of cars with which petitioner's work was concerned at the time he was injured was established on behalf of petitioner by the following adduced evidence in the Record, to wit:

> W. F. CONLEY was the respondent's yard conductor in charge of and directing the petitioner and his switching crew on that morning, November 29th, 1930 (R. 74). It was Conley's business, as conductor, to know what cars were on Track 2 and where they were to be moved in order that he could properly supervise the switching of these cars on to the various classification tracks. THE RESPONDENT CALLED CONLEY AS ITS WITNESS. On cross examination Conley testified that when the locomotive was coupled to the cars on Track 2, the morning of November 29th, 1930, THERE WERE TWENTY-ONE CARS ON THAT TRACK. HE FURTHER TESTIFIED THAT THESE TWENTY-ONE CARS then on Track 2 WERE THE SAME TWENTY-ONE CARS ENUMERATED IN PLAINTIFF'S EXHIBIT 14 (R. 49), AND WERE POSITIONED ON TRACK 2

AS SHOWN ON EXHIBIT 14 (R. 49, 75). The testimony of Conley was positive, as shown by the Record, as follows,

> "Plaintiff's Exhibit 14 was the correct list of cars on Track 2, checking them from east to west, when I pulled them out. THERE WERE TWENTY-ONE CARS ON THE TRACK. I couldn't say whether I got the most easterly car 38740, which was a set back" (R. 75).

Admittedly the most easterly car on that track was 38740, a setback car, AND THE MOST WESTERLY CAR ON THAT TRACK WAS CAR 61355, DENOTED BY AN "X-MARK" ON SAID EXHIBIT 14 (R. 49). THERE WAS NO EVIDENCE ADDUCED BY RESPONDENT OR IN THE RECORD THAT ANY OF THESE CARS WERE MOVED OR THEIR POSITIONS CHANGED BETWEEN THE TIME RESPONDENT MADE ITS CHECK OF THESE CARS ON NOVEMBER 28, 1930, AND THE TIME THESE CARS WERE MOVED OFF TRACK 2 ON NOVEMBER 29TH, 1930.

WHEREFORE, Car 61355, the LOADED INTERSTATE CAR ON THE MORNING OF NOVEMBER 29TH, 1930, STILL MAINTAINED ITS SAME POSITION ON THAT TRACK, to wit, AT THE EXTREME WESTERLY END OF THE "CUT", and was the first and most westerly car in the "cut".

In corroboration of Conley's testimony, MOORE observed the presence of the car coupled to the engine (R. 52). Moore observed that the second car west of the engine was H. V. 21342 and the third car west of the engine was C. & O. 33555.

MOORE'S CONTENTION WAS THAT CAR 61355 WAS POSITIONED BETWEEN H. V. 21342 and THE ENGINE (R. 52). Moore's testimony was positive and based on actual observation and recollection (R. 52, 55), since Moore had positioned himself on the stirrup of the second car, H. V. 21342, while the train was moving off Track 2, en route to the "lead" track (R. 51, 52). Those were the undisputed positions of

Cars H. V. 21342 and C. & O. 33555 on the morning of November 29th, 1930 (R. 52).

WHEREFORE, NO CHANGE HAVING OCCURRED IN THE RESPECTIVE POSITIONS OF THE CARS ON TRACK 2, THE EVIDENCE STRONGLY CORROBORATES PETITIONER'S CONTENTION THAT THE CAR COUPLED BETWEEN THE ENGINE AND H. V. 21342 WAS NONE OTHER THAN THIS INTERSTATE CAR 61355, since if respondent's contention is correct that it had departed the day before, then H. V. 21342 would have become and would have been the most westerly car in the "cut" and the next car coupled to the engine. THIS WAS NOT THE SITUATION. On the contrary H. V. 21342 retained its original position in the "cut", to wit, the second car from the engine.

Moore further testified that the purpose of the movement of these cars from Track 2 to the "lead" track was "to get out from these cars whatever loads were in there" (R. 52).

As against this credible and substantial evidence adduced on behalf of petitioner that Car 61355 was present in the "cut" of cars with which his work was concerned at the time he was injured, the respondent, in support of its contention that this car had departed the day before the accident from the "Russell Yard", produced only one witness, a T. C. IRWIN, its Chief Record Clerk.

Irwin testified that he had no personal knowledge of the movement of this car and undertook to testify respecting its movement on November 28th and November 29th, 1930 from records prepared in his office, AND THIS WAS ALL THE EVIDENCE INTRODUCED BY RESPONDENT ON THIS SUBJECT RESPECTING THIS ISSUE CONCERNING THE PRESENCE OF CAR C. & O. 61355 in the RUSSELL, KENTUCKY, Yard on November 29th, 1930 aforesaid.

It is striking indeed that on such an important issue, if it were true as respondent contends that Car

C. & O. 61355 departed from Russell, Kentucky, on November 28th, 1930, that respondent failed to produce even one member of its switching crew who would testify that he, from personal knowledge, participated in the movement of this car from off Track 2 to a train in said Russell, Kentucky, Yard on November 28th, 1930.

NO SUCH WITNESS OR EVIDENCE WAS PRODUCED BY RESPONDENT RESPECTING ANY SUCH ACTUAL MOVEMENT OF THIS CAR FROM OFF TRACK 2 IN THE RUSSELL YARD ON NOVEMBER 28TH, 1930.

(2)

Cars C & O 33555 and H V 21342 had not terminated their interstate movement while in the Russell, Kentucky Yard on November 29th, 1930, or, while amongst the cars with which petitioner's work was concerned at the time he was injured.

At Columbus, Ohio, these two cars were specifically consigned by the respondent to "C. V. RATCLIFFE, Raceland Shops", for the heavy repairs to be made thereto as designated on "B F 4" form cards which were attached to these cars at Columbus, Ohio, by respondent in the regular course of its business (R. 37, 38, 39, 40, 47, 50, 51, 52, 79), and they were transported by the respondent over its railroad from Columbus, Ohio, and arrived at the respondent's Russell, Kentucky, Yard on November 27th, 1930 (R. 70). THE SPECIFIED DESTINATION OF THESE TWO CARS WAS THE HEAVY REPAIR SHOP KNOWN AS "RUSSELL CAR SHOP" AND WHICH WAS LOCATED AT RACELAND, KENTUCKY (R. 37, 39, 40, 50, 52). This shop was variously known as and referred to in the trial of the case as the "RUSSELL SHOP", "NEW SHOP", and similarly, and also as the "RACELAND SHOPS", but they all referred to the "Shop" located at Raceland, Kentucky (R. 40, 50). Raceland, Kentucky, is located three miles west of

Russell, Kentucky, and the RACELAND SHOP is located still further west from Raceland (R. 50). THE UNDISPUTED EVIDENCE IN THE RECORD IS THAT THIS SHOP, VARIOUSLY REFERRED TO AS THE RUSSELL CAR SHOP, NEW SHOP, AND RACELAND SHOP, IS LOCATED AT RACELAND, KENTUCKY, AND NOT AT RUSSELL, KENTUCKY (R. 40, 50).

En route, these cars passed Raceland, Kentucky, but had not been set off at Raceland because respondent did not maintain switching facilities at Raceland, Kentucky, for the switching out from trains of cars consigned to the Raceland Shop. Therefore, these trains, as did this train with these two cars, continued on to Russell, Kentucky (R. 50).

The practice of the respondent with respect to cars consigned to the "Shop" at Raceland, Kentucky, was to place such cars on Track 2 in the Russell, Kentucky, yard and thence move them from there onto Track 20 in the same yard, and from Track 20 these cars would be moved to the Raceland, Kentucky, Shop (R. 47, 50) regularly at about 8 o'clock in the morning (R. 51).

THE PLACING OF THESE TWO CARS C. & O. 33555 AND H. V. 21342 BY RESPONDENT ON ITS TRACK 2 IN ITS RUSSELL, KENTUCKY, YARD DID NOT CONSTITUTE A DELIVERY OF THESE TWO CARS TO THEIR DESTINATION FOR THE REASON THAT TRACK 2 IN THE RUSSELL YARD IS NOT A PART OF THE "RACELAND SHOP". THE "SHOP" IS LOCATED MORE THAN A MILE AND A HALF FROM TRACK 2. TRACK 2 WAS BUT A TEMPORARY STOPPING POINT, AS PART OF THE CUSTOMARY PLAN OF THE COMPANY FOR THE MOVEMENT OF THESE CARS TO THE "SHOP" AT RACELAND (R. 47, 50, 51).

THE DESTINATION WAS THE "SHOP" AT RACELAND, KENTUCKY, AND THESE TWO CARS, UNTIL THEY HAD ACTUALLY ARRIVED AT THE "SHOP" AT RACELAND, KENTUCKY, WOULD UNTIL SUCH TIME BE STILL EN ROUTE TO THEIR DESTINATION. THIS WAS TESTIFIED

TO BY RESPONDENT'S OWN WITNESS, C. R. CALLAHAN, WHO WAS ITS ASSISTANT TERMINAL TRAIN MASTER AT RUSSELL, KENTUCKY, AND WHO ADMITTED AND TESTIFIED AS FOLLOWS:

> "These cars would not be delivered to destination until they had arrived at that Shop at Raceland" (R. 79, 80).

The issues of fact created by the evidence concerning the interstate character of the three aforementioned cars, and petitioner's work in connection therewith at the time he was injured, were properly issues for the jury and properly required the Trial Court to overrule the respondent's motion "for a directed verdict".

POINT V.

Petitioner's testimony respecting the respondent's violation of the Safety Appliance Act is in accord with the physical facts, was corroborated by evidence in the record other than his own testimony, and properly required the District Court to overrule the respondent's motion for a "directed verdict" on that issue.

Petitioner charged the respondent with the acts of negligence averred in his first cause of action, as appears in the Record at page 5 thereof, and which similarly appears as respects the second cause of action, at pages 10 and 11 thereof. (The allegations of negligence are identical in every respect in both causes of action.)

The District Court herein submitted the evidence adduced respecting the alleged negligence to the jury.

The testimony of the petitioner with respect to the physical facts surrounding the occurrence of the incident re-

sulting in his injury is in the Record, pages 50 to 59 inclusive, and is briefly, as follows:

> At about 6 o'clock in the morning of November 29, 1930, petitioner and his crew had moved a "cut" of cars from Track 2 in the Russell, Kentucky Yard of the respondent to a "lead" track in the same yard for the purpose of switching these cars out of the "cut" and onto various classification tracks in said yard (R. 51, 52, 72, 75). Berkhardt, another member of petitioner's crew, uncoupled the first easterly car in the "cut" and it was "kicked" up the track and on to a Track 20 (R. 52, 71, 72).
>
> It was petitioner's duty, in the line of his work, to "cut", that is, "uncouple" the next car from the train of cars and likewise "kick" it up the track (R. 52, 71). Petitioner thereupon undertook in the usual and ordinary manner to make said uncoupling, to wit: by operating the uncoupling lever of the car. The uncoupling lever of this car that petitioner undertook to operate was known as the "push-down" type of uncoupling lever, which required petitioner, in the usual and ordinary operation thereof, to take hold of the handle of the uncoupling lever, push it down, and by force thereof, the inner arm of the lever is supposed to raise the lock-block in the coupler and thereby effect a release of the knuckles of the cars and a separation or uncoupling thereof (R. 52, 53, 54).
>
> In taking hold of the push-down type of uncoupling lever to operate the same to effect an uncoupling, it ordinarily, normally and usually does not require the brakeman to put any part of his body between the cars to effect the uncoupling (R. 53). In the ordinary operation of a push-down type of uncoupling lever, the handle thereof, when pushed down by the brakeman, ordinarily makes a drop of 12 or 15 inches, and ordinarily the handle does not descend closer to the top of the rail than to within

18 inches from the top thereof, when the lockblock releases the knuckle and effects an uncoupling (R. 53).

Moore thereupon took hold of the handle of the uncoupling lever with his left hand and shoved it down in the usual, normal and ordinary way (R. 53). The handle descended to within at least 12 inches from the top of the rail (R. 53). The handle of the lever dropped more than 15 inches when pushed down by Moore, and *it descended in an arc inwardly between the cars* (R. 54).

Moore observed that the lever in its descent went lower than the center of the wheel (R. 54). The center of the wheel is 16 and ½ inches above the top of the rail (R. 90). Moore's further observation was that the handle in its descent went lower than the bottom of the axle of the car (R. 53). The bottom of the axle of the car is 13 and ½ inches above the top of the rail (R. 53).

Moore observed that the handle descended below his knee (R. 57), and he did not feel the lever go solid (R. 57). He observed the lever to be bent and twisted *and in that condition it could go to within a foot of the rail* (R. 53, 54, 58, 90).

The handle of the lever descended to within 12 inches of the top of the rail but the lock-block did not release the knuckle or uncouple the car (R. 54, 72). *He saw no "stop" on the car* (R. 58).

Petitioner's hand was caught by the wheel, run over and mangled, due to the low descent of the handle when operated by him and the travel of the handle inwardly between the cars, and his body was caused to be pulled between the cars and inwardly approximately 2 feet from the inner rail (R. 53, 54).

The aforesaid testimony of the petitioner was based on his own observations of the conditions and incident recited by him, and at a time when he was in a physical position

to see and observe the matters observed and testified to by him (R. 58).

The Testimony of Petitioner Is in Accord With The Physical Facts, As Established by the Following Evidence in the Record.

When Moore shoved the lever handle down he did not feel it go solid (R. 57). This was corroborated by the fact that the "stop" was "bent up" as indicated by a photograph of the car exhibited by petitioner at the trial (R. 54). There was a bend in the lever where the bolt goes through the lever (R. 54, 58). The "stop" on this car was "bent up" so that there was three or four inches "clearance" from the top of the arm to the "stop". This was indicated in the picture. The lever could still go lower in the condition the "stop" was in (R. 54, 90).

This photograph, Petitioner's Exhibit 15 (R. 54) was a correct and true representation of the car and its uncoupling lever appurtenance when operated by petitioner. Plaintiff's Exhibit 15 was examined by the jury (R. 54) and this Photograph Exhibit shows the position of the handle of the uncoupling lever therein to be closer to the rail than the center of the wheel and the bottom of the axle of the car (R. 54, 91).

THIS PHOTOGRAPH, PETITIONER'S EXHIBIT 15, WAS A PICTURE OF THE CAR WHICH THE RESPONDENT TOOK WITHIN A FEW HOURS AFTER THE OCCURRENCE OF THE ACCIDENT (R. 78), and petitioner introduced said Photograph as his Exhibit (R. 54).

Within a half minute after Moore's hand was run over by the wheel of the car, Berkhardt, the other brakeman of the crew, came to Moore's assistance and asked Moore what happened, and Moore answered to the effect that his accident was due to a "low lever" and that when he went to make the "cut", the "low lever" unbalanced him (R. 72).

Conley, the conductor of Moore's crew, was the first person who had the opportunity to and did examine the lever of the car that Moore handled. He made an examination thereof within an hour after Moore's accident and was the first person who made an examination thereof (R. 75).

The uncoupling of this car was not effected, as the car was still coupled to the rest of the cars when Conley examined the lever (R. 75). Conley signed a "Statement" which was introduced in evidence by petitioner and which "Statement" was admitted to have been signed by Conley, and to contain the facts as recited by him therein. In that statement Conley said as follows:

> "I observed that the lever of the third car that Moore was working on was too low" (R. 76).

That the lever was bent and could descend to within a foot of the rail was admitted by its witnesses (R. 87, 90).

WHEREFORE, THE EVIDENCE AND TESTIMONY OF PETITIONER IS CREDIBLE, SUBSTANTIAL, IN ACCORD WITH THE PHYSICAL FACTS, AMPLY SUPPORTED AND SUSTAINED THE ALLEGATIONS OF HIS COMPLAINT WITH RESPECT TO THE ACTS OF NEGLIGENCE CHARGED THEREUNDER, AND THE DISTRICT COURT PROPERLY OVERRULED RESPONDENT'S MOTION TO DIRECT A VERDICT RESPECTING THIS ISSUE.

San Antonio & A. P. R. R. Co. v. *Wagner*, 241 U. S. 476, 60 L. Ed. 1110;
Minneapolis & St. Paul etc. Ry. Co. v. *Popplar*, 237 U. S. 369, 59 L. Ed. 1000;
Atlantic City Ry. Co. v. *Packard*, 242 U. S. 56, 61 L. Ed. 150;
Payne v. *Colvin*, 276 Fed. 15;
Pennsylvania R. R. Co. v. *Jones*, 308 Fed. 525.

POINT VI.

The District Court did not err in its charge to the jury.

Petitioner in his complaint charged the respondent with the following act of negligence, to wit:

> (R. 5) "2. Said defendant used and permitted to be used on its aforesaid railroad a car equipped with a 'push-down' type of uncoupling lever, a part and appurtenance of the coupler, the handle of which lever when operated in the usual, normal and ordinary way dropped more than fifteen inches over all."

With respect to this allegation of negligence, the theory and contention of petitioner is concisely set forth and supported by the evidence in the record, to wit:

> (R. 53) "It was a 'push-down' type of lever.
>
> I took hold of the handle of the lever and shoved it down in the normal, usual and ordinary way.
>
> Ordinarily the lever makes a drop of twelve or fifteen inches.
>
> ON THIS OCCASION, IT MADE A DROP OF TWO FEET AT LEAST.
>
> Ordinarily, in operating a lever of this type, the handle does not descend below 'eighteen inches from the top of the rail'."
>
> (R. 53) "The handle of this lever descended to within 'at least twelve inches of the top of the rail'."
>
> (R. 53) "*This lever descended below the bottom of the axle.*
>
> The bottom of the axle is thirteen and one-half inches above the top of the rail."
>
> (R. 54) "The 'stop' is over the inner part of the arm and controls the distance that the outside arm can go down.

It is ordinarily so maintained that it will stop the downward action of the lever so that it will not exceed fifteen inches.

THE STOP ON THIS CAR WAS BENT UP * * *.

The lever could still go lower in the condition that this stop was in."

(R. 53) "I pushed it down and it went so low it unbalanced me and throwed my hand under the wheel and my hand was mangled."

Petitioner's Exhibit 15, the photograph of the car, and its coupler appurtenances, showed the handle of the lever to be in a position therein as close to the rail as was testified to by petitioner (R. 54).

The order of the Interstate Commerce Commission of March 13, 1911, promulgated in pursuance of the Federal Safety Appliance Act provides pertinently as follows:

UNCOUPLING LEVERS:

"Minimum drop of handles shall be twelve inches; maximum, fifteen inches over all. (See Pl. B.)"

"Handles of uncoupling LEVERS of the 'ROCKING' OR 'PUSH-DOWN' TYPE shall be not less than eighteen inches from the top of rail when lock-block has released knuckle."

1.

The theory and contention of petitioner was, that the handle of the lever when pushed down by petitioner descended more than fifteen inches, which brought it to within at least twelve inches from the top of the rail, in violation of the order of the Commission which prohibits a lever of this type from going below 18 inches from the top of rail to release the knuckle.

The District Court in its "Charge" to the jury adopted the petitioner's theory, and confined the jury's consideration, as respected the respondent's liability, to a determina-

tion of the question as to whether this lever descended below eighteen inches from the top of the rail when effecting an attempted release of the knuckle.

The "Charge" of the Court in the aforesaid appears as follows:

> (R. 102) "So that if you find the defendant used, in the operation of its cars, an uncoupling lever of the push-down type, the handle of which was less than eighteen inches from the top of the rail when the lock block released the knuckle, *that would be a violation of the Interstate Commerce rule and would make the defendant liable under the Safety Appliance Act* for any injury resulting to an employee by reason of a coupler of that type."

The District Court did not charge the jury, as suggested in the respondent's exception (R. 105), "that they, the jury, are entitled to award a recovery if the lever in question dropped more than fifteen inches over all". What the District Court did say, appears in the Record, to wit:

> (R. 103) "*The serious question* in this case *for you to consider is the question of whether or not the defendant violated the Safety Appliance Act*, in that it did not have an uncoupling lever that complied with the Safety Appliance Act and the rules of the Interstate Commerce Commission *with reference to the height above the rail AND the maximum movement of the handle of the uncoupling device.*"

The Court in its charge used the word "AND" when referring to the, "height above the rail AND the maximum movement of the handle" provisions of the Order instead of the word "OR". The use of the word "AND" in said pertinent charge bears out the petitioner's contention that the Court confined the jury's consideration, as respected the respond-

ent's liability, to a determination of the question and issue to wit, whether the lever descended below the "eighteen inch above the top of the rail" limitation provided by the Commission's Order.

2.

The violation of the one Provision of the Order proved the violation of the other Provision of the Order of the Commission, since the downward movement of the handle in excess of fifteen inches, by reason thereof, brought this handle of the lever closer to the top of the rail than permitted by the Order.

The position of the handle of the lever was either 28 or 29 inches above the top of the rail when Moore took hold of it and pushed it down, as was indicated by the evidence in the record, to wit:

> (R. 93) "The bottom of the end sill of the car was 36 inches above the top of the rail."
>
> (R. 86) "The position of the handle of the lever was 7 or 8 inches below the bottom of the end sill."

The descent of the handle when pushed down by Moore "in excess of fifteen inches" thereby brought it to within at least fourteen inches "from the top of the rail", as indicated from the fact that 15 inches subtracted from 29 inches (the position of the handle above the rail when Moore took hold of it) equals fourteen inches "above the top of the rail" aforesaid, to which point the handle descended to. Since the order of the Commission prohibits a lever of the "push-down" type from descending lower than "to within eighteen inches from the top of the rail", it follows that the descent of this lever to within fourteen inches of the top of the rail thereby constituted a violation of both provisions of the Order, and the violation of the one "Provision" proved the violation of the other "Provision".

3.

If, as contended by respondent in its brief and denied by petitioner, the Court erred in its charge with respect to the provision of the Commission's Order relating to the maximum fifteen inch drop of the handle, such error, if any, harmed the petitioner and not the respondent, since it imposed thereby an additional burden upon him, in order to establish his right to a recovery, of proving the violation by respondent of that provision of the Order respecting the maximum movement of the handle of the uncoupling device, as charged by the Court,

> (R. 103) "The serious question in this case for you to consider is the question of whether or not the defendant violated the Safety Appliance Act, in that it did not have an uncoupling lever that complied with the Safety Appliance Act and the rules of the Interstate Commerce Commission with reference to the height above the rail *AND* the maximum movement of the handle of the uncoupling device."

whereas petitioner could have established his right to a recovery by proving ***alone*** the violation by respondent of that Provision of the Order of the Commission respecting the "height above the rail", to wit, that "eighteen inches from the top of the rail shall be the closest point to the rail that a lever handle of the push-down type shall descend to when effecting a release of the knuckle".

This assumption on the part of the petitioner of the aforesaid additional burden of proof in no wise having harmed the respondent, the respondent's alleged error of the Court in its charge, if any, which in consequence thereof required the petitioner to assume said additional burden of proof, was not prejudicial error affecting the substantial rights of the respondent, since by reason of the charge of the Court the charge was more favorable to respondent than it was entitled to under the law.

28 U. S. C. A. 391;

St. Joseph & G. I. R. R. Co. v. *Moore*, 243 U. S. 311, 61 L. Ed. 741;

C. R. I. & P. R. R. Co. v. *Ward*, 252 U. S. 18, 64 L. Ed. 431;

Clarke v. *Erie R. R. Co.*, 230 Fed. 478.

"On the hearing of any appeal, certiorari, writ of error or motion for a new trial, in any case, civil, or criminal, the Court shall give judgment after an examination of the entire record before the Court, without regard to technical errors, defects or exceptions, which do not affect *the substantial rights of the parties* (28 U. S. C. A. 391)."

CONCLUSION.

We respectfully submit that the Circuit Court of Appeals for the Seventh Circuit in this cause is in error, that its decision should be reversed and the original judgment of the District Court of the United States for the Northern District of Indiana should be restored.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

No. 173.

JAMES B. MOORE,

Petitioner,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

No. 173.

JAMES B. MOORE,

Petitioner,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

SUPPLEMENTAL STATEMENT OF THE CASE.

The petitioner brought this action against the respondent in the District Court of the United States for the Northern District of Indiana, Fort Wayne Division, to recover damages for personal injuries alleged to have been sustained while he was employed as a switchman in re-

spondent's yards at Russell, Kentucky (R. 2). The complaint was in two paragraphs, each seeking to recover for the same injury. It was alleged in each paragraph that the injury was occasioned by a coupler which was defective, in that it failed to comply with certain requirements of the Federal Safety Appliance Act and the orders of the Interstate Commerce Commission thereunder promulgated.

The first paragraph alleged that respondent was engaged, and Moore was by it employed, in interstate commerce, and "that plaintiff brings this action * * * under and by virtue of an act of Congress of the United States, approved April 22nd, 1908, and amendments thereto, and which act is commonly known as the Federal Employers' Liability Act, and under a certain act of the Congress of the United States known as the Safety Appliance Acts and the Rules and Orders lawfully promulgated thereunder by the United States Interstate Commerce Commission: * * * that said laws of the United States give to this Court jurisdiction to hear and determine this cause of action." It was further alleged that respondent was doing business within the territorial limits of said District Court (R. 2).

The second paragraph, while alleging that respondent was engaged in interstate commerce, and doing business within the territorial limits of said District Court, alleged that Moore was employed by respondent in intrastate commerce. It further alleged that Moore was a resident of Fort Wayne, Indiana, and a citizen of Indiana, and that

respondent was a Virginia corporation and a citizen of Virginia, and "that plaintiff brings this action * * * under and by virtue of an act of the Congress of the United States, commonly known as the Safety Appliance Acts and the Rules and Orders promulgated by the Interstate Commerce Commission of the United States," and also under certain laws of Kentucky, which were therein set out (R. 7).

Respondent appeared specially and filed, in two paragraphs, a plea in abatement to the jurisdiction of the District Court. The first paragraph was directed to the first paragraph of complaint. It denied that Moore was engaged in interstate commerce at the time of his injury, and asserted that, by reason of such fact, the Court had no jurisdiction under the Employers' Liability Act. It further alleged that respondent was an inhabitant of the Eastern District of Virginia, and that, so far as jurisdiction might depend on the fact that the suit arose under the Federal Safety Appliance Act, it could not be brought in any other district than that whereof respondent was an inhabitant (R. 17).

The second paragraph of the plea in abatement was directed to the second paragraph of complaint. It denied that Moore was a resident of Fort Wayne or a citizen of Indiana—he came to Fort Wayne but two days before the complaint was filed (R. 1, 35) from his home in Ohio, where his family still lived (R. 29). It further alleged, however, that respondent was an inhabitant of the Eastern

District of Virginia, and that the action, arising under the act of Congress, commonly known as the Safety Appliance Acts, could not be brought by any original process or proceeding in any district other than the Eastern District of Virginia (R. 14).

The District Court sustained a demurrer to the first paragraph of the plea in abatement (R. 20). A preliminary hearing was had before the Court on the second paragraph of the plea, resulting in a finding and ruling against the respondent (R. 20, 37).

The sustaining of the demurrer to the first paragraph and the ruling on the second paragraph of this plea to the jurisdiction were assigned as error in the Circuit Court of Appeals (R. 115).

The case was submitted to the jury on the complaint and an answer in denial. The Court refused to withdraw either paragraph of complaint from the jury (R. 99, 101), but charged the jury upon both paragraphs (R. 101). The jury returned a general verdict in favor of the plaintiff, with nothing to indicate upon which paragraph it was based (R. 22), upon which the Court rendered judgment (R. 28).

There was no substantial dispute in the evidence as to the interstate or intrastate character of Moore's employment. Respondent maintains at Russell, Kentucky, a terminal, including a classification and assembly yard for the switching of cars and trains, and within the limits of these terminal yards both tracks and shops for the repair

of cars (R. 50, 55, 65, 77). Within and on the south side of the yards, and abutting on the north corporate line of a village called Raceland (65), is what is known as the light side shop repair yard, consisting of five tracks, numbered from 1 to 5. Upon these tracks are placed cars requiring light or running repairs (R. 43, 50, 79).

On the evening of November 27, or the morning of November 28, 1930, twenty-one cars were placed on repair track No. 2. Twenty were empty coal cars which had arrived at Russell in different trains at various times between November 19th and November 27th (R. 45, 49, 62, 70). Empty coal cars are brought to Russell for breaking up and assembly. They have no destination other than Russell. Cars that are "shopped" by the inspectors are switched out. Those in condition for road service are classified on various yard tracks and lined up preparatory to leaving. At such time it is not known where they will go, whether within or without the State of Kentucky. In like manner, when cars are switched off the light repair tracks and classified as good-order cars, setbacks and cars for the shops, it is not known whether the good-order cars will go to West Virginia or Kentucky. They are assembled into trains and their destination is then determined by the chief car distributor (R. 74, 77).

The remaining car and the most westerly one in the cut was C. & O. 61355, loaded with sand, en route from Vauces, Ohio, to Surveyor, West Virginia. It received

repairs occupying a few minutes some time between 7:30 a. m. and 4 p. m. on November 28 (R. 65); and was shown to have left Russell at 6:45 p. m. on November 28th by the report of the conductor of the train in which it was moved. It was set out at Barboursville, West Virginia, its train proceeding on to Hanley, West Virginia, some sixty-five miles east of Barboursville, where it arrived at 12:35 a. m. on November 29th. The car was shown to have left Barboursville in a train which left Huntington at 6:35 a. m. on November 29th, by the car report of the conductor of that train, and to have arrived at Hanley, West Virginia, at 4:55 p. m. on that day. It left Hanley at 8 a. m. on December 3rd, was set out at Quinnamont, and left that place at 1 p. m., arriving at Rowley at 2:30 p. m. It left Rowley at 4 p. m. and arrived at Mobscott at 6:25 p. m., all on December 3rd, and finally arrived at Surveyor at 1 p. m. on December 4th. Its presence in each of the various trains was shown by the car reports of the various conductors (R. 69, 70). Light running repairs were made to some fifteen of the remaining cars; one was marked "setback" and the balance were ordered to the shops for heavy repairs or paint jobs (R. 45, 46, 47).

Between 5 and 6 o'clock on the morning of November 29th, the crew of which Moore was a brakeman or switchman began switching this cut of cars, all of which were empty, off of shop track No. 2 (R. 51, 52, 74, 75). They were not making up trains, but doing yard switching or

classifying cars (R. 74). The engine, headed east, proceeded onto shop track No. 2, coupled onto the west end of the cut, and backed out onto the lead (R. 51, 55, 71, 74). The easternmost car was then cut off and, while Moore was attempting to cut off the next car, he became unbalanced and his hand was thrown under the wheel and mangled, resulting in its amputation (R. 53).

On the extreme west end of the cut, after the removal of car C&O 61355, and directly in front of the engine, were HV 21342 and C&O 33555 (R. 49). They were inspected on the shop track at Parsons Yard, Columbus, Ohio, on November 26th and November 24th, respectively, and were ordered sent to the Russell car shops for the repair of their sills, as indicated by cards called "B. F. 4" cards, tacked on the cars and containing information that they were consigned to C. V. Ratcliffe, who was the foreman of the Russell car shops, by order of C. F. Ehrman, car foreman at Columbus. It was the practice, after such cars arrived at Russell, for those there in charge to use their judgment as to making repairs (R. 38, 39). A car might be consigned to the shop on account of a break in a sill without the break being a serious one, and the extent of the break would determine whether the car was to continue in service without being first repaired (R. 95).

These cars arrived at Russell at 12:15 p. m. on November 27th (R. 70), and they were among the cars placed on shop track No. 2 on the evening of that day or the morning of November 28th. No repairs were made to them

while they were on the shop track (R. 47, 63) and they were not, in fact, taken to the Russell shops (R. 94).

They left Russell in a train at 3:10 p. m., November 29th, and arrived at Logan, West Virginia, at 10:20 p. m. on that day (R. 70).

Respondent moved the District Court to direct the jury to return a verdict in its favor for the reasons, among others, that the evidence was insufficient to establish the fact that the plaintiff was employed in interstate commerce at the time of receiving the injury complained of (R. 21), and assigned the overruling of this motion as error in the Circuit Court of Appeals (R. 117).

SUMMARY OF ARGUMENT.

POINT I.

The Judgment of the District Court Was Properly Reversed Because of Its Erroneous Rulings With Respect to Its Jurisdiction Over the Action Declared on in the First Paragraph of Complaint, for the Reasons That:

(a) The first paragraph of the plea in abatement, to which a demurrer was sustained, stated facts showing an absence of jurisdiction over the first paragraph of complaint.

(b) The evidence failed to establish the fact that the petitioner was employed in interstate commerce and a verdict for respondent should have been directed on that ground.

(c) Having failed to establish the interstate character of his employment, the petitioner is not entitled to again try this action in the District Court in which the same was instituted, and that part of the judgment of the Circuit Court of Appeals providing that he be granted permission to amend his first paragraph of complaint is a more favorable ruling than that to which he is entitled.

(d) Since the judgment of the District Court was properly reversed because of errors with respect to its jurisdiction over the first paragraph of complaint, the judg-

ment of the Circuit Court of Appeals ought not to be disturbed on account of questions relating to the reasons assigned for the reversal or the language used in its opinion.

POINT II.

The Judgment of the District Court Was Properly Reversed Because of Its Error in Ruling Against the Respondent on the Second Paragraph of Its Plea in Abatement, Challenging the Court's Jurisdiction Over the Second Paragraph of Complaint, for the Reasons That:

(a) The Circuit Court of Appeals correctly held that the action declared on in the second paragraph of complaint was brought under the Safety Appliance Act, and that the jurisdiction of federal courts generally was thereby invoked, not only on the ground of diversity of citizenship, but also on the ground that the suit arose under a law of the United States.

(b) Since jurisdiction was not founded ONLY on the fact that the action was between citizens of different states, it could be brought in no other district than that whereof the defendant was an inhabitant.

(c) The decision of the Circuit Court of Appeals, to the effect that the District Court was without jurisdiction over the action stated in the second paragraph of complaint, was based squarely on the ground that the action

was brought under the Federal Safety Appliance Act, thereby constituting a ground of federal jurisdiction other than diversity of citizenship.

(d) Any statement in the opinion to the effect that, ASSUMING that the action was based exclusively on the Kentucky Statutes, those statutes and the Safety Appliance Act could not be considered *pari materia*, for the reason that the latter act applies only to interstate commerce, is purely *obiter dictum* and affords no ground for the granting of a writ of certiorari.

(e) The fact that the action may have been brought under a statute of Kentucky as well as under a federal statute, and the question whether or not the two statutes are considered in *pari materia* or otherwise are wholly immaterial. So long as federal law forms an essential ingredient of the cause of action, federal courts have jurisdiction on the ground that the suit arises under a law of the United States.

ARGUMENT.

POINT I.

The Judgment of the District Court was Properly Reversed Because of Its Erroneous Rulings With Respect to Its Jurisdiction Over the Action Declared on in the First Paragraph of Complaint, for the Reasons That:

(a) **The first paragraph of the plea in abatement, to which a demurrer was sustained, stated facts showing an absence of jurisdiction over the first paragraph of complaint.**

The first paragraph of the complaint expressly invoked the jurisdiction of the District Court upon two separate grounds. It was alleged that the defendant was engaged and that plaintiff was employed in interstate commerce, and that the action was brought under and by virtue of an act of Congress known as the Federal Employers' Liability Act. It was further alleged that the action was brought under an act of Congress known as the Safety Appliance Acts and the rules and orders lawfully promulgated thereunder by the United States Interstate Commerce Commission, and that this act also gave the Court jurisdiction to hear and determine the cause of action. The respondent was charged with the violation of the Safety Appliance Act and such rules and orders in some six particulars.

The first paragraph of the plea in abatement met the first ground of federal jurisdiction, namely, that the suit was within the Employers' Liability Act, with a challenge to the jurisdiction of federal courts generally over the cause of action by specifically denying each and all of the allegations of the complaint to the effect that the plaintiff was engaged in interstate commerce. It met the second ground of federal jurisdiction, namely, that the suit arose under the federal Safety Appliance Act, not by questioning the jurisdiction of federal courts generally over the cause of action, but by insisting that, by reason of the fact that the respondent was an inhabitant of the Eastern District of Virginia, the venue was improperly laid and the District Court was without jurisdiction because of the provisions of 28 U. S. C. A. 112 (a), providing that:

> "Except as provided in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant."

It is no doubt true that the defense that the Court was without jurisdiction because the plaintiff was not in fact engaged in interstate commerce, challenging, as it did, the jurisdiction of federal courts generally over the cause of action, could have been raised at any stage of the proceedings. The defense that, in so far as jurisdiction de-

pended upon the fact that the suit arose under the Safety Appliance Act, the same could be brought only in the district of the defendant's residence, was a defense questioning the territorial jurisdiction or venue of the court below, and would have been waived had it not been interposed at the first opportunity. Section 389 of Burns' Annotated Indiana Statutes 1926, made applicable by the Practice Conformity Act (28 U. S. C. A. 724), provides:

> "Pleadings denying the jurisdiction of the Court, or in abatement of the action and all dilatory pleadings, must be supported by affidavit. * * * An answer in abatement must precede, and cannot be pleaded with, an answer in bar, and the issue thereon must be tried first and separately."

It was held by this Court in Gilbert v. David, 235 U. S. 561, 567, that:

> "It is the duty of the defendant to bring the matter to the attention of the Court, in some proper way, where the facts are known upon which a want of jurisdiction appears."

It was, therefore, proper for, and the duty of, the respondent, at the outset of the litigation, to raise the question that, by reason of the fact that the petitioner was not in fact engaged in interstate commerce, the Court was without jurisdiction on the first ground on which its jurisdiction was invoked. It was absolutely essential that respondent, before pleading to the merits, raise the question

that, in so far as jurisdiction might depend upon the fact that the suit arose under the Safety Appliance Act, the District Court was without jurisdiction because the respondent was an inhabitant of another district.

Under the facts alleged in the first paragraph of the plea in abatement, and admitted by the demurrer, the Court had no jurisdiction over the first paragraph of complaint upon either of the grounds upon which its jurisdiction was sought to be invoked. In the face of this challenge to its jurisdiction, therefore, the District Court, at the outset, committed error in sustaining a demurrer to the paragraph of the plea in question and in assuming jurisdiction to try and determine the case.

The decisions of the Circuit Courts of Appeal are in harmony in holding that the question as to whether an employe is in fact engaged in interstate commerce is essentially a jurisdictional question.

In Rice v. Baltimore & O. R. Co., 42 F. (2d) 387, 393, an action was brought against a Maryland railroad corporation in a federal District Court in Ohio, where the defendant was doing business, in which it was alleged that the parties were engaged in interstate commerce. The plaintiff failed to prove that he was engaged in interstate commerce, and the District Court directed a verdict for the defendant. The Circuit Court of Appeals for the Sixth Circuit held that

> "The judgment should recite that the plaintiff was not engaged in interstate commerce, and that, for that

reason, the case is dismissed for lack of jurisdiction in the Northern District of Ohio and without prejudice to a suit in the proper forum based upon any rights other than these given by the Employers' Liability Act."

In Aldredge v. Baltimore & O. R. Co., 20 F. (2d) 655, an action was brought in a state court in Missouri to recover damages, it being alleged that the plaintiff was employed by the defendant in interstate commerce. The defendant removed the case to a United States District Court in Missouri on the ground of diversity of citizenship, and in its petition for removal denied that the plaintiff was employed by it in interstate commerce. The plaintiff filed in the federal court a motion to remand, in which he reiterated that he was employed by the defendant in interstate commerce. It was contended by the plaintiff that the federal court, in passing on the motion to remand, did not have jurisdiction to determine the question as to whether or not the plaintiff was engaged in interstate commerce for the reason that that question went to the merits of his cause of action. The Circuit Court of Appeals for the Eighth Circuit held that, where the petition for removal traversed the allegations of the complaint, no issue was raised for determination on the motion to remand so far as the traverse related to facts alleged in the complaint which went to the merits of the cause, but that in so far as the traverse related to facts which conditioned jurisriction or removability, an issue was thus raised for determination. The Court say on page 658:

> "If plaintiff was engaged in interstate commerce, his cause of action was within the Federal Employers' Liability Act and not removable. The decision of the question, however, would not in any sense determine the merits of plaintiff's cause of action. It was a proper question for the Court to determine on the motion to remand. Our conclusion is that the federal court had jurisdiction to determine the question whether the plaintiff at the time of the accident was engaged in interstate commerce."

Since the question as to whether the petitioner was, in fact, engaged in interstate commerce was the question upon which the trial court's jurisdiction over the cause stated in the first paragraph of complaint depended, it was respondent's right, if indeed it was not its duty, to raise the question at the outset of the litigation by a plea denying that the petitioner was so engaged. Since the truth of the allegations of this paragraph of the plea was, so far as the question of jurisdiction was concerned, admitted by the demurrer, the District Court erred in sustaining the demurrer and in proceeding to try the cause.

(b) **The evidence failed to establish the fact that the petitioner was employed in interstate commerce and a verdict for respondent should have been directed on that ground.**

The question as to whether the plaintiff was engaged in interstate commerce is to be determined by the char-

acter of the work he was performing at the very moment of the injury. The fact that, prior to undertaking the task on which he was engaged, he may have been employed in interstate commerce; or that, upon completion of such task, he was expected to engage in another which would have been a part of interstate commerce, is wholly immaterial. The fact that cars which he assisted in moving had previously been employed in some interstate movement, or that they might subsequently be used in interstate commerce, would likewise be of no moment.

Illinois C. R. Co. v. Behrens, 233 U. S. 473, 476;
Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 178;
Lehigh Valley R. Co. v. Barlow, 244 U. S. 183, 184;
Erie R. Co. v. Welsh, 242 U. S. 303, 305;
Chicago etc. R. Co. v. Bolle, 284 U. S. 74, 77;
Chicago etc. R. Co. v. Ind. Com., 284 U. S. 296, 298;
N. Y. H. & H. R. Co. v. Bezue, 284 U. S. 415, 420;
Mayor v. Central Vt. R. Co., 26 F. (2d) 905, 907 (S. Dist. N. Y.), affirmed 26 F. (2d) 907 (C. C. A., 2nd Cir.).

Plaintiff was engaged in the switching of empty coal cars in a terminal yard or distribution point where they had been gathered together. The interstate character of any movement from other states had terminated when they had arrived at their stopping point in the yards and had been placed on the storage or repair tracks. Further movement of these cars would not partake of interstate

commerce until they had been definitely assigned to some interstate movement.

Pennsylvania R. Co. v. Knox, 218 Fed. 748, 749 (C. C. A. 3rd Cir.);
Wise v. Lehigh Valley R. Co., 43 F. (2d) 692, 693, 694 (C. C. A. 2d Cir.);
Shauberger v. Erie R. Co., 25 F. (2d) 297, 298 (C. C. A. 6th Cir.);
C. & E. R. Co. v. Feightner, 75 Ind. App. 677, 687, 114 N. E. 659;
Moran v. Central R. Co. of N. J., 88 N. J. L. 730, 96 Atl. 1023 (affirmed, 245 U. S. 629);
L. & N. R. Co. v. Meadors, 176 Ky. 765, 197 S. W. 440;
Murray v. P. C. C. & St. L. R. Co., 263 Pa. 398, 107 Atl. 21, 22.

At the time of the plaintiff's injury it was not known whether the empty cars which he was engaged in switching would be placed in trains going outside the State of Kentucky or in trains moving wholly within the State of Kentucky, or whether they might be loaded with interstate freight or intrastate freight. Under such circumstances the switching of these empty cars did not partake of interstate commerce.

Carey v. N. Y. Central R. Co., 250 N. Y. 345, 165 N. E. 805;
Chicago Junction R. Co. v. Industrial Board, 277 Ill. 512, 115 N. E. 647;
Patterson v. Director General, 115 S. C. 390, 105 S. E. 746, 748.

It was contended on the trial that an interstate character was imparted to petitioner's work because the dominant purpose in the switching in which he was engaged was to reach the two most westerly cars in the cut, HV 21342 and C&O 33555, and take them to the shops for repairs, thus completing an interstate movement from Columbus, Ohio. There was no such dominant purpose; these cars were not taken to the shops; and had they been taken there the movement would have been purely a local one.

The car which the petitioner was attempting to uncouple was at the extreme east end of the cut. HV 21342 and C&O 33555 were on the extreme west end of the cut and were already coupled onto the engine. The cars were on the shop lead, a track leading to the shops (R. 51, 74), and the shops were located a mile to the west (R. 50). These two cars could obviously have been taken to the shops without the necessity of moving any other cars. The immediate work on which the petitioner was engaged was the uncoupling of two admittedly intrastate cars. This was an end in itself and was in no sense for the "dominant purpose" of "reaching" cars which were already attached to the engine.

Shauberger v. Erie R. Co., 26 F. (2d) 297;
Wise v. Lehigh Valley R. Co., 43 F. (2d) 692, 694.

Cars H. V. 21342 and C. & O. 33555 were not taken to

the shops (R. 94), but left Russell at 3:10 p. m. on November 29 (R. 70).

Even had these cars been taken to the shops for repairs, their movement from the repair track, where they had been stored since their arrival some two days before, into the shop buildings would not, in any sense, have constituted interstate commerce. The Russell yards, embracing within their limits tracks on which cars were inspected, tracks on which cars were classified, tracks on which cars were repaired and enclosed buildings in which cars were repaired, comprised the Russell terminal. The fact that representatives of the company at Columbus contemplated that the cars in question, after their arrival at Russell, would, if those there in charge saw fit, be taken, in the course of the progress of the work, into the shop buildings to be repaired, would not prolong their interstate journey over the period during which they might remain on storage or repair tracks or be in the course of removal from such tracks to the shop buildings. Russell was the destination of these empty cars. They had there arrived, and after being switched out of their train had been placed on shop track No. 2, for the purpose, either of inspection—to determine whether the repairs suggested at Columbus should be made, for repair—if it was found that repairs which could be made on that track were advisable, or for storage—to await their removal to the enclosed shops. In either event their interstate journey had ended. They were in no sense instrumentalities of interstate commerce,

but were withdrawn from active service. Any subsequent movement from shop track No. 2, back over the route by which they had come, to the enclosed shops a mile or so to the west would have been a purely local or switching movement.

Schauffele v. Director General, 276 Fed. 115, 116;
Grigsby v. Southern R. Co., 3 F. (2d) 988, 989, certiorari denied 268 U. S. 704;
Shauberger v. Erie R. Co., 25 F. (2d) 297, 298 (C. C. A., 6th Cir.);
Ewing v. Coal & Coke R. Co., 82 W. Va. 427, 96 S. E. 73, 74.

The mere fact that, following the removal of the cut of cars in question from shop track No. 2, other cars employed in interstate commerce might be placed upon said track for repairs would not impart to the removal of the cut in question the character of interstate commerce.

Wise v. Lehigh Valley R. Co., 43 F. (2d) 692, 693, 694 (C. C. A., 2nd Cir.);
Mayor v. Central Ver. R. Co., 26 F. (2d) 905, 907, affirmed 26 F. (2d) 907 (C. C. A., 2nd Cir.).

The only loaded car in the cut which was placed on shop track No. 2 on the evening of November 27th or the morning of November 28th was C. & O. 61355. This car left Russell, however, at 6:45 o'clock on the evening of November 28th. The petitioner was not injured until about 6 o'clock on the morning of November 29th, and this car,

consequently, could not have been in the cut of cars which was being moved. No doubt can exist but that this car left Russell at the time stated. This was shown by the wheel report of the conductor of the train in which it was moved. It may be urged that, because of the possibility of human error, the conductor may have been mistaken in including this car on his wheel report among those comprising his train. This might be true if the question were dependent wholly upon the correctness of a single wheel report. In the course of its movement over the main and branch lines of the defendant company from Russell to its destination at Surveyor, however, this car was moved by six different trains. The wheel reports of the conductors of each of those trains disclosed the presence of this particular car in their respective trains. It was set out from the train in which it left Russell at Barboursville, West Virginia, and picked up by a train which left Huntington at 6:35 a. m. on November 29th (R. 70). This could not possibly have happened had it still been at Russell, Kentucky, at the time of plaintiff's injury, and in like manner it would have been impossible for this car to have been in any of the trains in which it was shown to have been moved by the wheel reports, had any of these records been incorrect. The record of the movement of the car from Russell to point of destination was absolutely complete and consistent. It is utterly inconceivable that all six of the conductors could have made a mistake in entering the

same identical car on their wheel reports if it had not, in fact, been included in their trains.

Conley, the conductor of the switching crew, was shown the repair list of the twenty-one cars which were on shop track No. 2 at 9 o'clock on the morning of November 28th, and was asked whether those were the cars which were removed from that track on November 29th, and he replied in the affirmative (R. 49, 75). His attention was not particularly directed to car C. & O. 61355 and he obviously intended to do no more than identify the list which had been made by the foreman of the repair gang as the list including the cars which he moved. He specifically stated (R. 75): **"These cars were empty."** His testimony cannot, therefore, be construed as saying that any car loaded with sand was included in those that he moved.

In Rice v. Baltimore & O. R. Co., 42 F. (2d) 387, 389, relied upon by petitioner, an effort was made to show that certain cars, thereafter loaded and consigned for interstate shipment, were in the movement in connection with which the plaintiff was injured. The Court say:

> "But the evidence most clearly shows that none of these cars were in the Lumberport-Haywood movement, that they had been placed at the Dawson mine some hours before the accident. What there is in the testimony to throw any doubt on the certainty of this conclusion is so vague and inconclusive as to be negligible for any purpose. It is also shown that at about 10 o'clock, or about four hours after Rice's in-

jury and on the return trip of Rice's crew, seven empties were delivered to the Corona mine, which were loaded in the afternoon and thereafter weighed and billed and consigned for interstate shipment. The evidence that any of these Corona cars was in the cut at the time of the accident is so scant as to make such a conclusion very speculative. The fact question upon which there is even a conflict in testimony, being the existence of jurisdiction, should affirmatively and distinctly appear."

The petitioner seeks to gloss over the question as to whether the evidence in fact showed that he was engaged in interstate commerce by the statement, on page 23 of his brief, that the general verdict of the jury conclusively established in his favor the issue that he was employed in interstate commerce at the time that he sustained his injury. The record does not bear him out. There was nothing to indicate whether the jury's verdict was based on the first or the second paragraph of complaint. With equal plausibilty, therefore, it might be said that the verdict conclusively established in his favor the issue tendered by the second paragraph of complaint, to the effect that he was engaged, not in interstate, but in intrastate commerce.

(c) **Having failed to establish the interstate character of his employment, the petitioner is not entitled to again try this action in the District Court in which the same was instituted, and that part of the judgment of the Circuit Court of Appeals providing that he be granted permission to amend his first paragraph of complaint is a more favorable ruling than that to which he is entitled.**

The District Court, being manifestly without jurisdiction over the action declared on in the first paragraph of complaint under the pleadings, by reason of facts alleged in the plea to its jurisdiction and admitted by the demurrer, and being likewise without jurisdiction under the evidence, the Circuit Court of Appeals properly reversed the judgment. Petitioner's complaint is apparently directed, not to the fact that the judgment was reversed, but to the instructions that he be permitted to amend his first paragraph of complaint to conform exclusively to the theory that the acts complained of constituted a violation of the Federal Employers' Liability Act. He is not in a position to complain of these instructions because they were unduly favorable to him. Having been permitted after an erroneous ruling on the demurrer to the plea in abatement to once try his case and having failed to establish by evidence that he was engaged in interstate commerce, a verdict should have been directed against him or, at most, as in Rice v. Baltimore & O. R. Co., 42 F. (2d) 387, his action should have been ordered dismissed for lack of jurisdiction without prejudice to a suit in the

proper forum, based on other rights than those given by the Employers' Liability Act.

(d) **Since the judgment of the District Court was properly reversed because of errors with respect to its jurisdiction over the first paragraph of complaint, the judgment of the Circuit Court of Appeals ought not to be disturbed on account of questions relating to the reasons assigned for the reversal or the language used in its opinion.**

There being a want of jurisdiction over the action stated in the first paragraph of complaint, both because the plea in abatement alleged and the demurrer thereto admitted that petitioner was not engaged in interstate commerce, and because the evidence failed to establish that petitioner was so engaged, the judgment of the Circuit Court of Appeals reversing the judgment of the District Court was clearly right. It ought not to be disturbed, nor should a writ of certiorari be granted for its review, merely because some question may arise as to the correctness of the particular ground on which the Court based its judgment of reversal, or because exceptions may be taken to some of the language employed in the opinion. It is settled beyond controversy that where there is any ground upon which the action of the Court from which an appeal is sought to be taken may be sustained, the judgment will be upheld, even though there may be a question

as to the particular ground or reason assigned for the action of the lower court.

Story Parchment Co. v. Patterson Parchment Co., 282 U. S. 555, 560;
Langness v. Green, 282 U. S. 531, 536;
U. S. v. American Railway Express Co., 265 U. S. 425, 435.

In the case last cited it is said:

"But it is likewise settled that an appellee may, without taking a cross appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court, or an insistence upon matter overlooked or ignored by it. By the claims now in question, the American does not attack, in any respect, the decree entered below. It merely asserts additional grounds why the decree should be affirmed."

POINT II.

The Judgment of the District Court Was Properly Reversed Because of Its Error in Ruling Against the Respondent on the Second Paragraph of Its Plea in Abatement, Challenging the Court's Jurisdiction Over the Second Paragraph of Complaint, for the Reasons That:

(a) **The Circuit Court of Appeals correctly held that the action declared on in the second paragraph of complaint was brought under the Safety Appliance Act, and that the jurisdiction of federal courts generally was thereby invoked, not only on the ground of diversity of citizenship, but also on the ground that the suit arose under a law of the United States.**

No possible doubt exists but that the action declared on in the second paragraph of the complaint arose under a law of the United States, namely, the Safety Appliance Act. The petitioner alleged: "That plaintiff brings this action against the defendant under and by virtue of an Act of the Congress of the United States commonly known as the Safety Appliance Act and the Rules and Orders promulgated by the Interstate Commerce Commission of the United States" (R. 7). It sought to charge respondent with a violation of this Act of Congress and such Rules and Orders of the Commission in some six particulars (R. 12).

45 U. S. C. A. 2, 15;

Order of Interstate Commerce Commission promulgated March 13, 1911 (see Appendix).

It has been many times held, and never denied, that the Safety Appliance Acts give to an employe, injured as a result of their violation, a right of action for the injuries thus sustained.

In San Antonio etc. R. Co. v. Wagner, 241 U. S. 475, 484, cited by petitioner, the following language from Texas & P. R. Co. v. Rigsby, 241 U. S. 33, is quoted:

> "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted the right to recover the damages from the party in default is implied."

In Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 39, it is further said:

> "None of the acts, indeed, contains express language conferring a right of action for the death or injury of an employe; but the safety of employes and travelers is their principal object, and the right of private action by an injured employe, even without the Employers' Liability Act, has never been doubted."

In Central Vermont Ry. Co. v. Perry, 10 F. (2d) 132, 133, cited by petitioner, it is said:

> "The Safety Appliance Act supplementing and en-

larging the provisions of the Act of March 2, 1893, all of which were enacted 'to promote the safety of employes and travelers upon railroads,' impose an absolute duty upon common carriers by rail to equip their cars with certain appliances and their locomotives with safe and suitable boilers and appurtenances and although these provisions of law do not in express terms confer a right of action upon an employe injured because of a failure to comply with such requirements, it has been held that by implication they give him a right of action for personal injuries not resulting in death."

To the same effect is Director General v. Ronald, 265 Fed. 128, 147, likewise cited by petitioner, in which it was held that the plaintiff might recover irrespective of his engagement in interstate commerce. The following language is used in the concurring opinion:

"Liability is expressed and fixed by the statute (Safety Appliance Act) itself and is to be found therein."

It follows from the foregoing authorities that an action by an employe for personal injuries, resulting from an alleged violation of the Safety Appliance Act on the part of his employer, is conferred by and necessarily arises out of that act. This being true, jurisdiction to hear and determine such a cause of action is conferred upon the federal district courts by the express provision of 28 U. S. C. A. 41 (Judicial Code, Section 24), which provides:

"The District Courts shall have original jurisdiction * * * of all suits of a civil nature, at common law or in equity * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00 and arises under the Constitution or laws of the United States."

The second paragraph of complaint, by expressly alleging that the action was brought under the Act of Congress commonly known as the Safety Appliance Acts, and by seeking a recovery on no grounds other than an alleged violation of that act, clearly invoked the jurisdiction of federal courts on the ground that the action was a suit of a civil nature arising under a law of the United States.

(b) **Since jurisdiction was not founded ONLY on the fact that the action was between citizens of different states, it could be brought in no other district than that whereof the defendant was an inhabitant.**

The venue of the suit stated in the second paragraph of complaint is controlled by the general venue provision of 28 U. S. C. A. 112 (a) (Judicial Code, Section 51, amended), which provides:

"Except as provided in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where jurisdiction is founded only on the fact that the action is between citizens of

different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Respondent, appearing specially, filed its plea in abatement to the jurisdiction of the Court (R. 14), in which it alleged that it was at all times

> "an inhabitant of the Eastern District of Virginia, and that the action declared upon in said paragraph of complaint being brought against the defendant and arising under and by virtue of an act of the Congress of the United States commonly known as the Safety Appliance Acts and the rules and orders promulgated by the Interstate Commerce Commission of the United States, the same cannot be brought in any district court against this defendant by any original process or proceeding in any other district than said Eastern District of Virginia, whereof it is an inhabitant as aforesaid."

The fact that respondent was an inhabitant of Virginia was admitted by the complaint and established by the evidence, and, in finding against the respondent upon and in overruling this paragraph of its plea in abatement, the District Court committed error, for which its judgment was necessarily reversed by the Circuit Court of Appeals.

It is true that the petitioner also invoked the jurisdiction of the District Court over the action declared upon in his second paragraph of complaint upon the ground of diversity of citizenship by alleging that he was a citizen

of Indiana and respondent a citizen of Virginia. He alleged that he was a resident of, and that respondent was doing business in, the Ft. Wayne Division of the Northern District of Indiana, and claimed the right to there maintain the action under the authority of the exception contained in the section last quoted, authorizing the suit to be brought in the district of the residence of either the plaintiff or defendant. This he manifestly could not do because jurisdiction was not founded only on the fact that the action was between citizens of different states, but also upon the further fact that the suit arose under a law of the United States.

It has been many times held that where an action is within the general jurisdiction of the federal courts, both upon the ground of diversity of citizenship and because founded on a law of the United States, such action can be brought only in the district of which the defendant is an inhabitant.

McCormick Co. v. Walters, 134 U. S. 41, 43;
Re Keasbey & Mattison Co., 160 U. S. 221, 228, 229;
Whittaker v. Illinois Central R. Co., 176 Fed. 130 (E. Dist. La.);
W. H. Goff Co. v. Lamborn, 281 Fed. 613, 616 (C. C. A., 5th Cir.);
Trapp v. B. & O. R. R. Co., 283 Fed. 655;
Atlantic Coast Line R. Co. v. Macon Grocery Co., 166 Fed. 206, 210 (C. C. A., 5th Cir.), affirmed 215 U. S. 501;
Newell v. Baltimore etc. R. Co., 181 Fed. 698, 699 (W. Dist. Pa.);

Smith v. Detroit etc. R. Co., 175 Fed. 506, 507 (N. Dist. Ohio);
Cound v. A. T. & S. F. R. Co., 173 Fed. 527, 532 (West. Dist. Texas).

The fact that the petitioner alleged that he brought his action under the Employers' Liability Act of Kentucky as well as under the Federal Safety Appliance Act, does not have the slightest bearing upon the jurisdictional question in controversy. In order that federal jurisdiction may attach to a suit arising under a law of the United States it is in nowise essential that the action shall be based **solely** on federal law, or that the same may not in some of its aspects be affected or controlled by the common law or the statutory enactments of the states.

In Union Pacific R. Co. v. Myers, 115 U. S. 1, it was held that actions, some of them for personal injuries under the rules of the common law, arose under the laws of the United States by reason of the mere fact that the defendant corporations had been created by or were organized under acts of Congress. Manifestly, if a suit arises under a law of the United States merely because the defendant is a corporation organized pursuant to such a law, an action such as the case at bar, which is brought to recover damages on account of the alleged violation by the defendant of a law of Congress claimed to have been enacted for the protection of the plaintiff, arises under the law in question. In deciding the case last cited the Court, in re-

ferring to the decision of Judge Marshall in the case of Osborn v. The Bank of the United States, 9 Wheat. 738, say:

> "But as it was objected that several questions of general law might arise in a case, besides that which depended upon an act of Congress, the Court first disposed of that objection, holding that, as scarcely any case occurs every part of which depends on the Constitution, laws or treaties of the United States it is sufficient for the purposes of federal jurisdiction if the case necessarily involves a question depending upon such Constitution, laws or treaties."

The Court then quoted the following language of Chief Justice Marshall in the case last referred to:

> "We think, then, that when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or law may be involved in it."

In Nashville v. Cooper, 6 Wall. 247, the Supreme Court used this language:

> "Nor is it any objection that questions are involved which are not all of a federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient. That element is decisive upon the subject of jurisdiction."

See, also:

New Orleans, N. & T. R. Co. v. Mississippi, 102 U. S. 135;
Cohens v. Virginia, 6 Wheat. 264;
Tennessee v. Davis, 100 U. S. 257.

(c) **The decision of the Circuit Court of Appeals, to the effect that the District Court was without jurisdiction over the action stated in the second paragraph of complaint, was based squarely on the ground that the action was brought under the Federal Safety Appliance Act, thereby constituting a ground of federal jurisdiction other than diversity of citizenship.**

Petitioner states, on page 28 of his brief, that the Circuit Court of Appeals based its decision that the District Court did not have jurisdiction of the cause of action stated in the second paragraph of the complaint on the premises that the Safety Appliance Act applies exclusively to interstate commerce and not to intrastate commerce, and that the Federal Safety Appliance Act is not in pari materia with the Employers' Liability Act of the State of Kentucky. The decision of the Circuit Court of Appeals was based on no such ground. The Court of Appeals say (R. 137):

> "We are convinced that appellee in his second paragraph attempted to state a cause of action under the Federal Safety Appliance Act as well as under the statutes of Kentucky, and he alleges facts therein,

which, if true, constituted a ground for federal jurisdiction other than diversity of citizenship. * * * that being the case, jurisdiction and venue were in the district of appellant's residence and not in the Northern District of Indiana."

(d) **Any statement in the opinion to the effect that, ASSUMING that the action was based exclusively on the Kentucky Statutes, those statutes and the Safety Appliance Act could not be considered *pari materia*, for the reason that the latter act applies only to interstate commerce, are purely *obiter dictum* and afford no ground for the granting of a writ of certiorari.**

In answering petitioner's contention that, notwithstanding his allegation that he brought his action under and by virtue of the Federal Safety Appliance Acts, his second paragraph of complaint should not be construed as founded thereon, the Circuit Court of Appeals, while holding that that paragraph was founded on the Safety Appliance Act, went on to say that **assuming** that the second paragraph was based exclusively upon the Kentucky statutes, those statutes and the Safety Appliance Act cannot be considered *pari materia* because the latter applies only to interstate commerce while the second paragraph of complaint alleged that both parties were engaged in intrastate commerce. This language of the Court was with reference to a state of facts which it held did not exist, was in no sense necessary to its decision of the case and was purely *obiter*

dictum. Clearly these remarks of the Court afford no ground for the reversal of the judgment of the Circuit Court of Appeals, nor for granting a writ of certiorari for its review.

(e) **The fact that the action may have been brought under a statute of Kentucky, as well as under a federal statute, and the question whether or not the two statutes are considered *in pari materia* or otherwise are wholly immaterial. So long as federal law forms an essential ingredient of the cause of action, federal courts have jurisdiction on the ground that the suit arises under a law of the United States.**

The fact that the action is brought under the Kentucky Employers' Liability Act, as well as the Federal Safety Appliance Act, has no bearing upon the question of jurisdiction under consideration. The gravamen of the suit is the alleged violation of the federal statute and the resultant injury. The cause of action would have existed without any employers' liability act, state or federal. The only effect of the Kentucky Employers' Liability Act on this particular cause of action was in the limitation of the defenses which might be interposed, and, so far as eliminating the defense of assumption of risk is concerned, the Kentucky Statute is inoperative, as this defense is taken away by the Safety Appliance Act itself.

45 U. S. C. A. 7.

It makes not the slightest difference in this case whether the Safety Appliance Act and the Kentucky Employers' Liability Act are to be construed *in pari materia* or otherwise. The Federal Safety Appliance Act is, in either case, an essential ingredient in the cause of action and affords a ground of federal jurisdiction.

Irrespective of any question as to the jurisdiction over the action declared on in the first paragraph of complaint, the judgment of the District Court was properly and necessarily reversed because of its error with respect to its jurisdiction over the action declared upon in the second paragraph. There is nothing in the record to show that the jury's verdict was not based on the second paragraph. The action declared on in that paragraph arose under a law of the United States and the jurisdiction of the federal courts thereby attached. Such jurisdiction was not founded solely on the ground of diversity of citizenship, and the action can be maintained only in the district of the respondent's residence. On this very ground the Circuit Court of Appeals reversed the judgment. Petitioner is not entitled to maintain in the United States District Court at Fort Wayne an action based both on the Federal Safety Appliance Act and the Kentucky statute regulating the liability of railroads for injuries to intrastate employes, and he is certainly in no position to complain of the instructions of the Circuit Court of Appeals, that he be permitted to amend his second para-

graph of complaint to conform exclusively to the theory that the acts complained of constitute a violation of the Kentucky Employers' Liability Act.

It is, with great respect, submitted that the writ of certiorari be denied.

ALBERT H. COLE,
Counsel for Respondent.

APPENDIX.

The order or rules of the Interstate Commerce Commission, promulgated on March 13, 1911, with reference to uncoupling levers, is as follows:

"Uncoupling Levers:

"Number: Two (2).

"Uncoupling levers may be either single or double, and of any efficient design.

"Dimensions: Handles of uncoupling levers, except those shown on plate B or of similar designs, shall be not more than six (6) inches from sides of car.

"Uncoupling levers of design shown on plate B and of similar designs shall conform to the following prescribed limits:

"Handles shall be not more than twelve (12), preferably nine (9), inches from sides of cars. Center lift arms shall be not less than seven (7) inches long.

"Center of eye at end of center lift arm shall be not more than three and one-half (3½) inches beyond center of eye of uncoupling pin of coupler when horn of coupler is against the buffer block or end sill. (See pl. B.)

"Ends of handles shall extend not less than four (4) inches below bottom of end sill or shall be so constructed as to give a minimum clearance of two (2) inches around handle. Minimum drop of handles shall be twelve (12) inches; maximum, fifteen (15) inches over all. (See pl. B.)

"Handles of uncoupling levers of the 'rocking' or 'push-down' type shall be not less than eighteen (18) inches from top of rail when lock block has released knuckle, and a suitable stop shall be provided to prevent inside arm from flying up in case of breakage.

"Location: One (1) on each end of car.

"When single lever is used, it shall be placed on left side of end of car."

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

No. 173.

JAMES B. MOORE,

Petitioner,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS.

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IN THE

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OCTOBER TERM, 1933.

No. 173.

JAMES B. MOORE,

Petitioner,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS.

MAY IT PLEASE THE COURT:

The judgment of the District Court was reversed by the Circuit Court of Appeals on account of errors committed by the District Court with respect to its jurisdiction. Other errors, occurring on the trial and assigned as error in the Circuit Court of Appeals, were not discussed in the opinion

of that court. The petition for a writ of certiorari and the brief in its support were confined to the jurisdictional questions upon which the reversal was based, and respondent's brief in opposition to the granting of the writ was likewise limited to these questions of jurisdiction.

A writ of certiorari having been granted, the entire record is now before this Honorable Court. Respondent insists that a reversal of the judgment of the District Court was proper, not only because of errors with respect to its jurisdiction, but because of these other errors so occurring and assigned. While they were not pertinent to a determination of the question as to whether a writ of certiorari should issue to review the decision of the Circuit Court of Appeals on the question of the jurisdiction of the District Court or as to the correctness of the instructions contained in the order of the Circuit Court of Appeals remanding the cause, they are essential to a determination of the question as to what judgment the Circuit Court of Appeals should have rendered upon the record then before it. A consideration of the errors assigned in the Circuit Court of Appeals, both jurisdictional and occurring on the trial, requires the following

SUPPLEMENTAL STATEMENT OF THE CASE.

The petitioner brought this action against the respondent in the District Court of the United States for the Northern District of Indiana, Fort Wayne Division, to recover dam-

ages for personal injuries alleged to have been sustained while he was employed as a switchman in respondent's yards at Russell, Kentucky (R. 2). The complaint was in two paragraphs, each seeking to recover for the same injury. It was alleged in each paragraph that the injury was occasioned by a coupler which was defective, in that it failed to comply with certain requirements of the Federal Safety Appliance Act and the orders of the Interstate Commerce Commission thereunder promulgated.

The first paragraph alleged that respondent was engaged, and Moore was by it employed, in interstate commerce, and "that plaintiff brings this action * * * under and by virtue of an act of the Congress of the United States approved April 22nd, 1908, and amendments thereto, and which act is commonly known as the Federal Employers' Liability Act, and under a certain act of the Congress of the United States known as the Safety Appliance Acts and the rules and orders lawfully promulgated thereunder by the United States Interstate Commerce Commission; * * * that said laws of the United States give to this Court jurisdiction to hear and determine this cause of action." It was further alleged that respondent was doing business within the territorial limits of said District Court (R. 2).

The second paragraph, while alleging that respondent was engaged in interstate commerce, and doing business within the territorial limits of said District Court, alleged that Moore was employed by respondent in intrastate com-

merce. It further alleged that Moore was a resident of Fort Wayne, Indiana, and a citizen of Indiana, and that respondent was a Virginia corporation and a citizen of Virginia, and "that plaintiff brings this action * * * under and by virtue of an act of the Congress of the United States, commonly known as the Safety Appliance Acts and the rules and orders promulgated by the Interstate Commerce Commission of the United States," and also under certain laws of Kentucky, which were therein set out (R. 7).

Respondent appeared specially and filed, in two paragraphs, a plea in abatement to the jurisdiction of the District Court. The first paragraph was directed to the first paragraph of complaint. It denied that Moore was engaged in interstate commerce at the time of his injury, and asserted that, by reason of such fact, the Court had no jurisdiction under the Employers' Liability Act. It further alleged that respondent was an inhabitant of the Eastern District of Virginia, and that, so far as jurisdiction might depend on the fact that the suit arose under the Federal Safety Appliance Act, it could not be brought in any other district than that whereof respondent was an inhabitant (R. 17).

The second paragraph of the plea in abatement was directed to the second paragraph of complaint. It denied that Moore was a resident of Fort Wayne or a citizen of Indiana. It further alleged, however, that respondent was an inhabitant of the Eastern District of Virginia, and

that the action, arising under the act of Congress, commonly known as the Safety Appliance Acts, could not be brought by any original process or proceeding in any district other than the Eastern District of Virginia (R. 14).

The District Court sustained a demurrer to the first paragraph of the plea in abatement (R. 20). A preliminary hearing was had before the Court on the second paragraph of the plea, resulting in a finding and ruling against the respondent (R. 20, 37).

The sustaining of the demurrer to the first paragraph and the ruling on the second paragraph of this plea to the jurisdiction were assigned as error in the Circuit Court of Appeals (R. 115). The case was submitted to the jury on the complaint and an answer in denial.

There was no substantial dispute in the evidence as to the interstate or intrastate character of Moore's employment. Respondent maintains at Russell, Kentucky, a terminal, including a classification and assembly yard for the switching of cars and trains, and within the limits of these terminal yards both tracks and shops for the repair of cars (R. 50, 55, 65, 77). Within and on the south side of the yards, and abutting on the north corporate line of a village called Raceland (R. 65), is what is known as the light side shop repair yard, consisting of five tracks, numbered from 1 to 5. Upon these tracks are placed cars requiring light or running repairs (R. 43, 50, 79).

On the evening of November 27, or the morning of November 28, 1930, twenty-one cars were placed on repair

track No. 2. Twenty were empty coal cars which had arrived at Russell in different trains at various times between November 19th and November 27th (R. 45, 49, 62, 70). Empty coal cars are brought to Russell for breaking up and assembly. They have no destination other than Russell. Cars that are "shopped" by the inspectors are switched out. Those in condition for road service are classified on various yard tracks and lined up preparatory to leaving. At such time it is not known where they will go, whether within or without the State of Kentucky. In like manner, when cars are switched off the light repair tracks and classified as good-order cars, setbacks and cars for the shops, it is not known whether the good-order cars will go to West Virginia or Kentucky. They are assembled into trains and their destination is then determined by the chief car distributor (R. 74, 77).

The remaining car and the most westerly one in the cut was C. & O. 61355, loaded with sand, en route from Vauces, Ohio, to Surveyor, West Virginia. It received repairs occupying a few minutes some time between 7:30 a. m. and 4 p. m. on November 28th (R. 65), and was shown to have left Russell at 6:45 p. m. on November 28th by the report of the conductor of the train in which it was moved. It was set out at Barboursville, West Virginia, its train proceeding on to Hanley, West Virginia, some sixty-five miles east of Barboursville, where it arrived at 12:35 a. m. on November 29th. The car was shown to have left Barboursville in a train which left Huntington at 6:35 a. m. on

November 29th by the car report of the conductor of that train, and to have arrived at Hanley, West Virginia, at 4:55 p. m. on that day. It left Hanley at 8 a. m. on December 3rd, was set out at Quinnamont, and left that place at 1 p. m., arriving at Rowley at 2:30 p. m. It left Rowley at 4 p. m. and arrived at Mobscott at 6:25 p. m., all on December 3rd, and finally arrived at Surveyor at 1 p. m. on December 4th. Its presence in each of the various trains was shown by the car reports of the various conductors (R. 69, 70).

On the extreme west end of the cut, after the removal of car C. & O. 61355, and directly in front of the engine, were H. V. 21342 and C. & O. 33555 (R. 49). They were inspected on the shop track at Parsons yard, Columbus, Ohio, on November 26th and November 24th, respectively, and were ordered sent to the Russell car shops for the repair of their sills, as indicated by cards called "B. F. 4" cards, tacked on the cars and containing information that they were consigned to C. V. Ratcliffe, who was the foreman of the Russell car shops, by order of C. F. Ehrman, car foreman at Columbus. It was the practice, after such cars arrived at Russell, for those there in charge to use their judgment as to making repairs (R. 38, 39). A car might be consigned to the shop on account of a break in a sill without the break being a serious one, and the extent of the break would determine whether the car was to continue in service without being first repaired (R. 95).

These cars arrived at Russell at 12:15 p. m. on Novem-

ber 27th (R. 70), and they were among the cars placed on shop track No. 2 on the evening of that day or the morning of November 28th. No repairs were made to them while they were on the shop track (R. 47, 63), and they were not, in fact, taken to the Russell shops (R. 94). They left Russell in a train at 3:10 p. m. November 29th, and arrived at Logan, West Virginia, at 10:20 p. m. on that day (R. 70).

Light running repairs were made to some fifteen of the remaining cars; one was marked "set back" and the balance were ordered to the shops for heavy repairs or paint jobs (R. 45, 46, 47).

Between 5 and 6 o'clock on the morning of November 29, 1930, the crew of which Moore was a member began the task of switching from shop track 2 this string of empty cars. They were not making up trains, but were doing yard switching or classifying cars. The cars were then not coupled together. The knuckles on the couplers were first opened. The engine entered the track and coupled onto the west end of the cut. As a result of this impact the cars were coupled together and the engine backed out onto the lead, pulling the cars (R. 51, 55, 71, 74). The coupling apparatus of every car properly performed its function. The cut was shoved eastwardly and Burkhardt, the other brakeman, cut off the first car. The cars were again started in response to a signal from Burkhardt, which Moore transferred, and the latter attempted to cut off the second car, 58038, by pushing down the un-

coupling lever on the forward end of the south side of the third car, 54069 (R. 53, 71, 74). He became unbalanced and his hand was thrown under the wheel and mangled, resulting in its amputation (R. 53). The cars were not uncoupled (R. 53).

The lever in question was a push-down type lever (R. 53). A device called a lock block works up and down inside the coupler. When this lock block drops down it catches the lip of the knuckle and holds it in place. When it is raised it releases the knuckle and permits the cars to uncouple. The height of the lock block is about eight inches and that of the coupler in which it travels about twelve inches, permitting an up-and-down travel of the lock block of about four inches. Connected to the lock block is a rod called a lock lift, which extends through a hole or slot in the top of the coupler one and one-fourth inches wide and two inches long. The lateral dimensions of the lock block are two and one-half inches by four or five inches, or about twice the dimensions of the hole through which the lock lift travels. The lock lift has a hole or eye in the top, through which the lever runs. The lever is in two pieces, or arms, of about equal length, attached to a single trunnion or lug, which is fastened to the end sill. The inner end of the outer arm extends some four inches past the trunnion and fits underneath the inner arm, so that when the handle at the outer end of the outer arm is pushed down it turns on the trunnion and that part extending inside

the trunnion is raised, lifting with it the inner arm, which likewise turns on the trunnion, thereby raising the lock lift and lock block, releasing the knuckles and permitting the cars to uncouple. The upward movement of the lock block in the coupler is arrested when it comes in contact with the top of the inside of the coupler (R. 52, 53, 56, 57, 84, 85, 88, 91, 94).

Attached to the end sill, to which the trunnion is attached, but toward the center, is a U-shaped piece of metal called a stop. It extends out over the inner arm of the lever. Its purpose is to prevent the inner lever from going higher in case the connection between the lock block and the coupler is broken. There is a slight clearance between the stop and the lever when the lock block is raised to where its upward motion is arrested by coming in contact with the top of the inside of the coupler. The stop is not intended to arrest the movement of the lever and serves no purpose so long as the lever is connected to the lock block, but is an additional safety device to prevent the inner lever from continuing to go up and the outer lever from continuing to go down should the connection between the lock block and the inner lever be in any manner broken (R. 80, 81, 83, 85, 88, 92, 95).

It was the petitioner's contention that this stop is intended to arrest the upward movement of the lever before the lock block comes in contact with the top of the inside of the coupler (R. 54, 57), and that this stop was bent upwards so that there was three or four inches

clearance between the stop and the lever (R. 54). The respondent's witnesses testified that there was a curve or bend in the stop, but that this was its original shape (R. 80, 85, 88).

Regardless, however, of whether the upward movement of the lever is arrested by the stop or by the lock block coming in contact with the coupler before the lever reaches the stop, it was undisputed that, the trunion on which the lever turns being midway between the end of the handle of the outer lever and the point where the lock pin fits on the inner lever (R. 53, 92), neither the downward movement of the handle nor the upward movement of the inner lever could exceed the difference between the height of the coupler and the height of the lock block which worked entirely inside it. This is a distance of not to exceed four inches (R. 57).

The connection between the lever and the lock block was not broken. Nothing defective about the coupling apparatus was observed at about 7 o'clock on the morning of the accident (R. 75), and at about 9 o'clock the lever was inspected and operated by three witnesses, and in each instance the lock block was raised and the knuckle released by shoving down on the handle of the lever. There was no indication, in the way of tool marks or otherwise, that any change had been made, the exposed nuts and ends of the bolts being somewhat rusted (R. 84, 88, 91, 92). Other tests were made on the same day and on the second day following, and in each instance the lever

and coupler operated perfectly. No difficulty was experienced in operating the lever and effecting an uncoupling without the necessity of anyone going between the cars (R. 79, 80, 81, 82, 83).

The petitioner testified that on the occasion in question he took hold of the handle of the lever and shoved it down, and that it made a drop of two feet at least, and to a point within twelve inches of the rail, thereby unbalancing him and pulling his body between the cars (R. 53).

The distance of the handle of the lever above the rail when the lock block had released the knuckle was accurately measured at about 9 o'clock on the morning of the accident, while the car was standing on a curve. The measurement was eighteen and one-half inches with the lock block fully raised and the handle of the lever pushed and held down as far as it would go (R. 85, 89, 91). In February it was again measured, while the car was standing on level track, and the distance to the rail from the point to which the handle descended measured twenty inches, with no one, however, holding or pressing down on the lever (R. 92, 94). It was again measured on level track on April 11, 1931, and the distance from the handle to the rail, with the handle held down, measured nineteen inches (R. 85, 86, 89, 92, 94, 95). The difference in the three measurements was accounted for by the fact that in one instance the car was on a curve and in another instance no one was pressing down on the lever. In each instance the distance traveled by the handle of the lever

from its position with the lock block down and the handle up to its position with the lock block up and the handle down was approximately four inches, or the limit of the travel of the lock block in the coupler (pages above noted).

There was introduced in evidence a statement of the yard conductor, in which he said that the lever was "too low." He did not appear to have made any measurements; said that he did not recall saying and did not know that it was too low, and testified that it was not any lower than other cars (R. 76).

Certain curves or bends, both vertical and lateral, are fabricated into all levers, including the one in question. In addition to these bends, there was a slight bend in this lever which had resulted from use. This bend, however, was a lateral one. It did not result in bringing the handle nearer the rail, and it did not interfere with the operation of the lever or render it unsafe (R. 85, 89, 91, 95).

A number of photographs of the car and its coupling apparatus were introduced in evidence, in which the lever appeared at various heights in relation to other objects shown in the pictures, all depending upon the elevation and position of the camera at the time the photographs were taken (R. 96, 97).

At the conclusion of the evidence respondent moved the Court to direct the jury to return a verdict in its favor, for six reasons, which might be summarized as follows:

(1) There was a want of jurisdiction in that:

(a) There was no evidence that petitioner was engaged in interstate commerce, thus precluding a recovery on the first paragraph of complaint.

(b) There could be no recovery on the second paragraph because the action was brought in a district other than that of respondent's residence.

(2) The evidence was insufficient to establish that petitioner's injury was due to any negligent or unlawful act of respondent (R. 98).

This motion was overruled (R. 99), and the Court refused to withdraw either paragraph of complaint from the jury, but charged the jury on both paragraphs (R. 99, 101). The jury returned a general verdict in favor of the petitioner (R. 22). There was nothing to indicate upon which paragraph of complaint it was based nor upon which of the alleged negligent or unlawful acts it was predicated.

The ground upon which petitioner primarily sought to charge respondent with responsibility for his injury was that respondent had violated two specific requirements of the order of the Interstate Commerce Commission promulgated pursuant to the provisions of the Safety Appliance Act in that it unlawfully and negligently used and permitted to be used on its railroad a car (1) equipped with a "push-down" type of uncoupling lever, the handle of which, when operated in the normal way, descended to a

point less than eighteen inches from or above the top of the rail without causing the "lock-block" or pin to release the knuckle; and (2) equipped with a "push-down" type of uncoupling lever, the handle of which, when operated in the normal way, dropped more than fifteen inches over all (R. 5, 10).

The Court, after refusing all instructions tendered by respondent, charged the jury, in part, as follows:

> "He (the plaintiff) also charges that the defendant used the same push-down type of uncoupling lever and handle of the lever which when operated in the usual, normal and ordinary way dropped fifteen inches over all." * * *
>
> "The first count or the first paragraph of the complaint is based on what we call the Safety Appliance Act."
>
> "Under the first paragraph of the complaint if you find there was a violation of the Safety Appliance Act and that the plaintiff and defendant were engaged in interstate commerce and that the plaintiff's injury was the proximate result of the violation of the Safety Appliance Act the plaintiff would be entitled to recover."
>
> "The Interstate Commerce Commission has provided certain rules and regulations and has provided the distance above the rail that interstate carriers shall be permitted to use couplers and uncouplers. The rule of the Interstate Commerce Commission provides that handles of uncoupling levers shall have a minimum drop of twelve inches, a maximum of fifteen inches over all." * * * "The serious ques-

tion in this case for you to consider is the question of whether or not the defendant violated the Safety Appliance Act, the uncoupling act, in that it did not have an uncoupling lever that complied with the Safety Appliance Act and the rules of the Interstate Commerce Commission with reference to the height above the rail and the maximum movement of the handle of the uncoupling device. If you find the defendant did violate that rule or a provision of the Safety Appliance Act and the plaintiff's injury was the proximate result of such violation, then the plaintiff is entitled to recover in this case" (R. 101, 102, 103).

Respondent at the time specifically excepted to the portion of the charge above quoted in the following words:

"The defendant excepts to the refusal of each of the instructions tendered by it and further excepts to that portion of the Court's charge wherein the jury are told that they are entitled to award a recovery if the lever in question dropped more than fifteen inches over all, for the reason that there is no provision in the Safety Appliance Act, or any regulation promulgated thereto by the Interstate Commerce Commission which contains any such requirements with reference to the lever as described in the complaint, and also described in the evidence" (R. 105).

SPECIFICATION OF ERRORS.

The errors, assigned in the Circuit Court of Appeals, which are hereby urged as grounds for the reversal are that

The District Court erred in:

(a) Sustaining petitioner's demurrer to the amended first paragraph of respondent's plea in abatement (R. 17, 19, 20, 115).

(b) Finding against respondent on the second paragraph of its plea in abatement (R. 14, 20, 36, 37, 115).

(c) Overruling respondent's motion to direct a verdict in its favor (R. 21, 22, 117).

(d) Giving to the jury the portions of the charge quoted in the "Statement of the Case" herein (R. 101, 102, 103, 105, 119).

SUMMARY OF ARGUMENT.

POINT I. **Upon certiorari the entire record is before the Supreme Court, not merely for a consideration of points raised by petitioner, but to the end that it may enter the judgment which should have been rendered by the court below on the record then before it.**

POINT II. **The first paragraph of the plea in abatement stated facts showing an absence of jurisdiction over the first paragraph of complaint and the demurrer thereto was erroneously sustained.**

POINT III. **The District Court erred in finding against respondent on the second paragraph of its plea in abatement challenging the Court's jurisdiction over the second paragraph of complaint for the reasons that:**

(a) The suit arose under the Safety Appliance Act, a law of the United States, and the jurisdiction of federal courts generally thereby attached.

(b) Diversity of citizenship was not the sole ground of federal jurisdiction, and the action could consequently be maintained only in the district of respondent's residence.

POINT IV. **A verdict for respondent should have been directed because the evidence failed to show that petitioner was engaged in interstate commerce, and only by**

proof of this fact could the suit be brought within the Court's jurisdiction.

POINT V. A verdict for respondent should have been directed, because the only evidence upon which a verdict for petitioner could rest was his own testimony, which was in direct conflict with undisputed physical facts.

POINT VI. The District Court erred in charging the jury that the Safety Appliance Act and the rules of the Interstate Commerce Commission required that the handle of the "push-down" type of uncoupling lever in controversy should have a maximum drop of fifteen inches and that if respondent violated this requirement as to the maximum movement of such handle the petitioner was entitled to recover, for the reason that no such requirement was contained either in such act or such rules.

ARGUMENT.

POINT I.

Upon Certiorari the Entire Record Is Before the Supreme Court, Not Merely for a Consideration of Points Raised by Petitioner, but to the End That It May Enter the Judgment Which Should Have Been Rendered by the Court Below on the Record Then Before It.

In the consideration of the appeal from the judgment of the District Court, the Circuit Court of Appeals felt compelled to go no farther than to pass upon certain questions of jurisdiction, which, it concluded, necessitated a reversal of the judgment. The scope of the inquiry in the Supreme Court, however, is not limited to such questions. If there was assigned, in the Circuit Court of Appeals, any error for which the judgment should have been reversed, the judgment of reversal will be upheld, whether such error was overlooked, ignored or its consideration deemed unnecessary because of the necessity of a reversal on other grounds.

Story Parchment Co. v. Patterson Parchment Co., 282 U. S. 555, 560;
Langness v. Green, 282 U. S. 531, 536;
U. S. v. American Railway Express Co., 265 U. S. 425 436.

POINT II.

The First Paragraph of the Plea in Abatement Stated Facts Showing an Absence of Jurisdiction Over the First Paragraph of Complaint, and the Demurrer Thereto Was Erroneously Sustained.

The first paragraph of the complaint expressly invoked the jurisdiction of the District Court upon two separate grounds. It was alleged that the defendant was engaged and that plaintiff was employed in interstate commerce, and that the action was brought under and by virtue of an act of Congress known as the Federal Employers' Liability Act. It was further alleged that the action was brought under an act of Congress known as the Safety Appliance Acts and the rules and orders lawfully promulgated thereunder by the United States Interstate Commerce Commission, and that this act also gave the Court jurisdiction to hear and determine the cause of action. The respondent was charged with the violation of the Safety Appliance Act and such rules and orders in some six particulars.

The first paragraph of the plea in abatement met the first ground of federal jurisdiction, namely, that the suit was within the Employers' Liability Act, with a challenge to the jurisdiction of federal courts generally over the cause of action by specifically denying each and all of the allegations of the complaint to the effect that the plaintiff was engaged in interstate commerce. It met the second

ground of federal jurisdiction, namely, that the suit arose under the Federal Safety Appliance Act, not by questioning the jurisdiction of federal courts generally over the cause of action, but by insisting that, by reason of the fact that the respondent was an inhabitant of the Eastern District of Virginia, the venue was improperly laid and the District Court was without jurisdiction because of the provisions of 28 U. S. C. A. 112 (a), providing that: "Except as provided in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant."

It is no doubt true that the defense that the Court was without jurisdiction because the plaintiff was not, in fact, engaged in interstate commerce, challenging, as it did, the jurisdiction of federal courts generally over the cause of action, could have been raised at any stage of the proceedings. The defense that, in so far as jurisdiction depended upon the fact that the suit arose under the Safety Appliance Act, the same could be brought only in the district of the defendant's residence, was a defense questioning the territorial jurisdiction or venue of the court below, and would have been waived had it not been interposed at the first opportunity. Section 389 of Burns' Annotated Indiana Statutes 1926, made applicable by the Practice Conformity Act (28 U. S. C. A. 724), provides:

"Pleadings denying the jurisdiction of the Court,

> or in abatement of the action and all dilatory pleadings, must be supported by affidavit. * * * An answer in abatement must precede, and cannot be pleaded with, an answer in bar, and the issue thereon must be tried first and separately."

It was held by this Court in Gilbert v. David, 235 U. S. 561, 567, that:

> "It is the duty of the defendant to bring the matter to the attention of the Court, in some proper way, where the facts are known upon which a want of jurisdiction appears."

It was, therefore, proper for, and the duty of, the respondent, at the outset of the litigation, to raise the question that, by reason of the fact that the petitioner was not, in fact, engaged in interstate commerce, the Court was without jurisdiction on the first ground on which its jurisdiction was invoked. It was absolutely essential that respondent, before pleading to the merits, raise the question that, in so far as jurisdiction might depend upon the fact that the suit arose under the Safety Appliance Act, the District Court was without jurisdiction because the respondent was an inhabitant of another district.

Under the facts alleged in the first paragraph of the plea in abatement, and admitted by the demurrer, the Court had no jurisdiction over the first paragraph of complaint upon either of the grounds upon which its jurisdiction was sought to be invoked. In the face of this chal-

lenge to its jurisdiction, therefore, the District Court, at the outset, committed error in sustaining a demurrer to the paragraph of the plea in question and in assuming jurisdiction to try and determine the case.

The decisions of the Circuit Courts of Appeal are in harmony in holding that the question as to whether an employe is in fact engaged in interstate commerce is essentially a jurisdictional question.

In Rice v. Baltimore & O. R. Co., 42 F. (2d) 387, 393, an action was brought against a Maryland railroad corporation in a Federal District Court in Ohio, where the defendant was doing business, in which it was alleged that the parties were engaged in interstate commerce. The plaintiff failed to prove that he was engaged in interstate commerce and the District Court directed a verdict for the defendant. The Circuit Court of Appeals for the Sixth Circuit held that:

> "The judgment should recite that the plaintiff was not engaged in inter tate commerce and that, for that reason, the case is dismissed for lack of jurisdiction in the Northern District of Ohio and without prejudice to a suit in the proper forum based upon any rights other than these given by the Employers' Liability Act."

In Aldredge v. Baltimore & O. R. Co., 20 F. (2d) 655, an action was brought in a state court in Missouri to recover damages, it being alleged that the plaintiff was

employed by the defendant in interstate commerce. The defendant removed the case to a United States District Court in Missouri on the ground of diversity of citizenship, and in its petition for removal denied that the plaintiff was employed by it in interstate commerce. The plaintiff filed in the federal court a motion to remand, in which he reiterated that he was employed by the defendant in interstate commerce. It was contended by the plaintiff that the federal court, in passing on the motion to remand, did not have jurisdiction to determine the question as to whether or not the plaintiff was engaged in interstate commerce for the reason that that question went to the merits of his cause of action. The Circuit Court of Appeals for the Eighth Circuit held that, where the petition for removal traversed the allegations of the complaint, no issue was raised for determination on the motion to remand so far as the traverse related to facts alleged in the complaint which went to the merits of the cause, but that, in so far as the traverse related to facts which conditioned jurisdiction or removability, an issue was thus raised for determination. The Court say, on page 658:

> "If plaintiff was engaged in interstate commerce, his cause of action was within the Federal Employers' Liability Act and not removable. The decision of the question, however, would not in any sense determine the merits of plaintiff's cause of action. It was a proper question for the Court to determine on the motion to remand. Our conclusion is that the federal

court had jurisdiction to determine the question whether the plaintiff at the time of the accident was engaged in interstate commerce."

Since the question as to whether the petitioner was, in fact, engaged in interstate commerce was the question upon which the trial court's jurisdiction over the cause stated in the first paragraph of complaint depended, it was respondent's right, if indeed it was not its duty, to raise the question at the outset of the litigation by a plea denying that the petitioner was so engaged. Since the truth of the allegations of this paragraph of the plea was, so far as the question of jurisdiction was concerned, admitted by the demurrer, the District Court erred in sustaining the demurrer and in proceeding to try the cause.

POINT III.

The District Court Erred in Finding Against Respondent on the Second Paragraph of Its Plea in Abatement Challenging the Court's Jurisdiction Over the Second Paragraph of Complaint for the Reasons That:

(a) **The suit arose under the Safety Appliance Act, a law of the United States, and the jurisdiction of federal courts generally thereby attached.**

No possible doubt exists but that the action declared on in the second paragraph of the complaint arose under a law of the United States, namely, the Safety Appliance Act. The petitioner alleged: "That plaintiff brings this

action against the defendant under and by virtue of an Act of the Congress of the United States commonly known as the Safety Appliance Acts and the rules and orders promulgated by the Interstate Commerce Commission of the United States" (R. 7). It sought to charge respondent with a violation of this Act of Congress and such rules and orders of the Commission in some six particulars (R. 12).

45 U. S. C. A. 2, 15;
Order of Interstate Commerce Commission promulgated March 13, 1911.

It has been many times held, and never denied, that the Safety Appliance Acts give to an employe, injured as a result of their violation, a right of action for the injuries thus sustained.

In San Antonio etc. R. Co. v. Wagner, 241 U. S. 475, 484, cited by petitioner, the following language from Texas & P. R. Co. v. Rigsby, 241 U. S. 33, is quoted:

> "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted the right to recover the damages from the party in default is implied."

In Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 39, it is further said:

> "None of the acts, indeed, contains express language conferring a right of action for the death or injury of an employe; but the safety of employes and travelers is their principal object, and the right of private action by an injured employe, even without the Employers' Liability Act, has never been doubted."

In Central Vermont Ry. Co. v. Perry, 10 F. (2d) 132, 133, cited by petitioner, it is said:

> "The Safety Appliance Act supplementing and enlarging the provisions of the Act of March 2, 1893, all of which were enacted 'to promote the safety of employes and travelers upon railroads,' impose an absolute duty upon common carriers by rail to equip their cars with certain appliances and their locomotives with safe and suitable boilers and appurtenances, and although these provisions of law do not in express terms confer a right of action upon an employe injured because of a failure to comply with such requirements, it has been held that by implication they give him a right of action for personal injuries not resulting in death."

To the same effect is Director General v. Ronald, 265 Fed. 128, 147, likewise cited by petitioner, in which it was held that the plaintiff might recover irrespective of his engagement in interstate commerce. The following language is used in the concurring opinion:

> "Liability is expressed and fixed by the statute (Safety Appliance Act) itself and is to be found therein."

It follows from the foregoing authorities that an action by an employe for personal injuries, resulting from an alleged violation of the Safety Appliance Act on the part of his employer, is conferred by and necessarily arises out of that act. This being true, jurisdiction to hear and determine such a cause of action is conferred upon the federal district courts by the express provision of 28 U. S. C. A. 41 (Judicial Code, Section 24), which provides:

> "The district courts shall have original jurisdiction * * * of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00 and arises under the Constitution or laws of the United States."

The second paragraph of complaint, by expressly alleging that the action was brought under the Act of Congress commonly known as the Safety Appliance Acts and by seeking a recovery on no grounds other than an alleged violation of that act, clearly invoked the jurisdiction of federal courts on the ground that the action was a suit of a civil nature arising under a law of the United States.

(b) **Diversity of citizenship was not the sole ground of federal jurisdiction, and the action could consequently be maintained only in the district of respondent's residence.**

The venue of the suit stated in the second paragraph of complaint is controlled by the general venue provision

of 28 U. S. C. A. 112 (a) (Judicial Code, section 51, amended), which provides:

> "Except as provided in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Respondent, appearing specially, filed its plea in abatement to the jurisdiction of the Court (R. 14), in which it alleged that it was at all times "an inhabitant of the Eastern District of Virginia, and that the action declared upon in said paragraph of complaint being brought against the defendant and arising under and by virtue of an act of the Congress of the United States commonly known as the Safety Appliance Acts and the rules and orders promulgated by the Interstate Commerce Commission of the United States, the same cannot be brought in any district court against this defendant by any original process or proceeding in any other district than said Eastern District of Virginia, whereof it is an inhabitant as aforesaid."

The fact that respondent was an inhabitant of Virginia was admitted by the complaint and established by the evidence, and, in finding against the respondent upon and in overruling this paragraph of its plea in abatement, the

District Court committed error, for which its judgment was necessarily reversed by the Circuit Court of Appeals.

It is true that the petitioner also invoked the jurisdiction of the District Court over the action declared upon in his second paragraph of complaint upon the ground of diversity of citizenship by alleging that he was a citizen of Indiana and respondent a citizen of Virginia. He alleged that he was a resident of, and that respondent was doing business in, the Ft. Wayne Division of the Northern District of Indiana, and claimed the right to there maintain the action under the authority of the exception contained in the section last quoted, authorizing the suit to be brought in the district of the residence of either the plaintiff or defendant. This he manifestly could not do because jurisdiction was not founded only on the fact that the action was between citizens of different states, but also upon the further fact that the suit arose under a law of the United States.

It has been many times held that where an action is within the general jurisdiction of the federal courts, both upon the ground of diversity of citizenship and because founded on a law of the United States, such action can be brought only in the district of which the defendant is an inhabitant.

McCormick Co. v. Walters, 134 U. S. 41, 43;
Re Keasbey & Mattison Co., 160 U. S. 221, 228, 229;
Whittaker v. Illinois Central R. Co., 176 Fed. 130 (E. Dist. La.);

W. H. Goff Co. v. Lamborn, 281 Fed. 613, 616 (C. C. A., 5th Cir.);
Trapp v. B. & O. R. R. Co., 283 Fed. 655;
Atlantic Coast Line R. Co. v. Macon Grocery Co., 166 Fed. 206, 210 (C. C. A., 5th Cir.), affirmed 215 U. S. 501;
Newell v. Baltimore etc. R. Co., 181 Fed. 698, 699 (W. Dist. Pa.);
Smith v. Detroit etc. R. Co., 175 Fed. 506, 507 (N. Dist. Ohio);
Cound v. A. T. & S. F. R. Co., 173 Fed. 527, 532 (West. Div. Texas).

The fact that the petitioner alleged that he brought his action under the Employers' Liability Act of Kentucky, as well as under the Federal Safety Appliance Act, does not have the slightest bearing upon the jurisdictional question in controversy. In order that federal jurisdiction may attach to a suit arising under a law of the United States it is in nowise essential that the action shall be based **solely** on federal law or that the same may not in some of its aspects be affected or controlled by the common law or the statutory enactments of the states.

In Union Pacific R. Co. v. Myers, 115 U. S. 1, it was held that actions, some of them for personal injuries under the rules of the common law, arose under the laws of the United States by reason of the mere fact that the defendant corporations had been created by or were organized under acts of Congress. Manifestly, if a suit arises under a law of the United States merely because the defendant

is a corporation organized pursuant to such a law, an action such as the case at bar, which is brought to recover damages on account of the alleged violation by the defendant of a law of Congress claimed to have been enacted for the protection of the plaintiff, arises under the law in question. In deciding the case last cited, however, the Court, in referring to the decision of Judge Marshall in the case of Osborn v. The Bank of the United States, 9 Wheat. 738, say:

> "But as it was objected that several questions of general law might arise in a case, besides that which depended upon an act of Congress, the Court first disposed of that objection, holding that, as scarcely any case occurs every part of which depends on the Constitution, laws or treaties of the United States it is sufficient for the purposes of federal jurisdiction if the case necessarily involves a question depending upon such Constitution, laws or treaties."

The Court then quoted the following language of Chief Justice Marshall in the case last referred to:

> "We think, then, that when a question to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or law may be involved in it."

In Nashville v. Cooper, 6 Wall. 247, the Supreme Court used this language:

"Nor is it any objection that questions are involved which are not all of a federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient. That element is decisive upon the subject of jurisdiction."

See also:

New Orleans, N. & T. R. Co. v. Mississippi, 102 U. S. 135;
Cohens v. Virginia, 6 Wheat. 264;
Tennessee v. Davis, 100 U. S. 257.

On the very ground herein urged, namely, that the cause of action declared upon in the second paragraph arose, in whole or in part, under the Safety Appliance Act, thereby constituting a ground for federal jurisdiction other than diversity of citizenship, the Circuit Court of Appeals held that venue was in the district of the respondent's residence, and that the District Court erred in its ruling with respect to the second paragraph of the plea in abatement. It is said in the opinion (R. 137):

"We are convinced that appellee in his second paragraph attempted to state a cause of action under the Federal Safety Appliance Act as well as under the statutes of Kentucky, and he alleges facts therein, which, if true, constituted a ground for federal jurisdiction other than diversity of citizenship. * * * That being the case, jurisdiction and venue were in the district of appellant's residence and not in the Northern District of Indiana."

Any language in the opinion, to the effect that assuming (what the Court held not to be the fact) that this paragraph of complaint was based exclusively on the Kentucky statute, that act and the Safety Appliance Act cannot be considered pari materia because the latter act applies only to interstate commerce, is purely obiter dictum. If incorrect, as petitioner contends (Respondent's Brief, pp. 9, 26), it can be corrected in such opinion as this Honorable Court may render. It affords no ground for the reversal of the judgment of the Circuit Court of Appeals or the reinstatement of the judgment of the District Court.

POINT IV.

A Verdict for Respondent Should Have Been Directed Because the Evidence Failed to Show That Petitioner Was Engaged in Interstate Commerce, and Only by Proof of This Fact Could the Suit Be Brought Within the Court's Jurisdiction.

The question as to whether the plaintiff was engaged in interstate commerce is to be determined by the character of the work he was performing at the very moment of the injury. The fact that, prior to undertaking the task on which he was engaged, he may have been employed in interstate commerce, or that, upon completion of such task, he was expected to engage in another which would have been a part of interstate commerce, is wholly immaterial. The fact that cars which he assisted in moving had pre-

viously been employed in some interstate movement, or that they might subsequently be used in interstate commerce, would likewise be of no moment.

Illinois C. R. Co. v. Behrens, 233 U. S. 473, 476;
Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 178;
Lehigh Valley R. Co. v. Barlow, 244 U. S. 183, 184;
Erie R. Co. v. Welsh, 242 U. S. 303, 305;
Chicago etc. R. Co. v. Bolle, 284 U. S. 74, 77;
Chicago etc. R. Co. v. Ind. Com., 284 U. S. 296, 298;
N. Y. H. & H. R. Co. v. Bezue, 284 U. S. 415, 420;
Mayor v. Central Vt. R. Co., 26 F. (2d) 905, 907 (S. Dist. N. Y.), affirmed 26 F. (2d) 907 (C. C. A. 2nd Cir.).

Plaintiff was engaged in the switching of empty coal cars in a terminal yard or distribution point where they had been gathered together. The interstate character of any movement from other states had terminated when they had arrived at their stopping point in the yards and had been placed on the storage or repair tracks. Further movement of these cars would not partake of interstate commerce until they had been definitely assigned to some interstate movement.

Pennsylvania R. Co. v. Knox, 218 Fed. 748, 749 (C. C. A. 3rd Cir.);
Wise v. Lehigh Valley R. Co., 43 F. (2d) 692, 693, 694 (C. C. A. 2d Cir.);
Shauberger v. Erie R. Co., 25 F. (2d) 297, 298 (C. C. A. 6th Cir.);

C. & E. R. Co. v. Feightner, 75 Ind. App. 677, 687, 114 N. E. 659;
Moran v. Central R. Co. of N. J., 88 N. J. L. 730, 96 Atl. 1023 (affirmed 245 U. S. 629);
L. & N. R. Co. v. Meadors, 176 Ky. 765, 197 S. W. 440;
Murray v. P. C. C. & St. L. R. Co., 263 Pa. 398, 107 Atl. 21, 22.

At the time of the plaintiff's injury it was not known whether the empty cars which he was engaged in switching would be placed in trains going outside the State of Kentucky or in trains moving wholly within the State of Kentucky, or whether they might be loaded with interstate freight or intrastate freight. Under such circumstances the switching of these empty cars did not partake of interstate commerce.

Carey v. N. Y. Central R. Co., 250 N. Y. 345, 165 N. E. 805;
Chicago Junction R. Co. v. Industrial Board, 277 Ill. 512, 115 N. E. 647;
Patterson v. Director General, 115 S. C. 390, 105 S. E. 746, 748.

It is contended by petitioner that an interstate character was imparted to petitioner's work because the dominant purpose in the switching in which he was engaged was to reach the two most westerly cars in the cut, HV 21342 and C&O 33555, and take them to the shops for repairs, thus completing an interstate movement from Columbus, Ohio.

There was no such dominant purpose; these cars were not taken to the shops; and had they been taken there the movement would have been purely a local one.

The car which the petitioner was attempting to uncouple was at the extreme east end of the cut. HV 21342 and C&O 33555 were on the extreme west end of the cut and were already coupled onto the engine. The cars were on the shop lead, a track leading to the shop (R. 51, 74), and the shops were located a mile to the west (R. 50). These two cars could obviously have been taken to the shops without the necessity of moving any other cars. The immediate work on which the petitioner was engaged was the uncoupling of two admittedly intrastate cars. This was an end in itself and was in no sense for the "dominant purpose" of "reaching" cars which were already attached to the engine.

> Shauberger v. Erie R. Co., 26 F. (2d) 297;
> Wise v. Lehigh Valley R. Co., 43 F. (2d) 692, 694.

Cars H. V. 21342 and C. & O. 33555 were not taken to the shops (R. 94), but left Russell at 3:10 p. m. on November 29 (R. 70).

Even had these cars been taken to the shops for repairs, their movement from the repair track, where they had been stored since their arrival some two days before, into the shop buildings would not, in any sense, have constituted interstate commerce. The Russell yards, embracing within their limits tracks on which cars were

inspected, tracks on which cars were classified, tracks on which cars were repaired and enclosed buildings in which cars were repaired, comprised the Russell terminal. The fact that representatives of the company at Columbus contemplated that the cars in question, after their arrival at Russell, would, if those there in charge saw fit, be taken, in the course of the progress of the work, into the shop buildings to be repaired, would not prolong their interstate journey over the period during which they might remain on storage or repair tracks or be in the course of removal from such tracks to the shop buildings. Russell was the destination of these empty cars. They had there arrived, and after being switched out of their train had been placed on shop track No. 2, for the purpose, either of inspection—to determine whether the repairs suggested at Columbus should be made, for repair—if it were found that repairs which could be made on that track were advisable, or for storage—to await their removal to the enclosed shops. In either event their interstate journey had ended. They were in no sense instrumentalities of interstate commerce, but were withdrawn from active service. Any subsequent movement from shop track No. 2, back over the route by which they had come, to the enclosed shops a mile or so to the west, would have been a purely local or switching movement.

Schauffele v. Director General, 276 Fed. 115, 116;
Grigsby v. Southern R. Co., 3 F. (2d) 988, 989; certiorari denied 268 U. S. 704;

Shanberger v. Erie R. Co., 25 F. (2d) 297, 298 (C. C. A., 6th Cir.);
Ewing v. Coal & Coke R. Co., 82 W. Va. 427, 96 S. E. 73, 74.

Petitioner contends, however, that the destination of these cars was "Raceland," and that having been switched out of their train at "Russell" they had not completed their journey. No such distinction can be made. The repair yards where they had been stored abutted on the corporate limits of the Village of Raceland, while the new shops were located a half mile west of Raceland (R. 65). The Town of Russell was located east of both the shops and the repair yards. The question cannot be determined by any narrow distinction between Raceland and Russell, because neither of these cars was billed to any station in the sense that loaded cars, moving under bills of lading, are transported from one station to another. They were sent to the Russell terminal in contemplation of the making of certain repairs in the event that, in the judgment of the company's officials at Russell, the same should be necessary. Having been there switched out of their train and placed on a storage or repair track, their interstate movement had terminated and any subsequent movement was local. Its character could not be altered by the opinion or conclusion of the witness Callahan or any other witness as to when and under what circumstances the cars arrived at their destination.

Petitioner further contends that these cars were "consigned" to C. V. Ratcliffe, the foreman of the Russell shops, and that, under the rule in Pennsylvania Co. v. Donat, 239 U. S. 50, their interstate journey was not complete until there had been a delivery to the consignee.

The question here presented is entirely different from that presented in a case as the Donat case, where loaded cars from another state are being switched onto a private switch for delivery to the consignee. In such a case it is universally held that their interstate movement does not terminate when they arrive at the yards and are switched out of their train, but continues until final delivery to the consignee. This is true for two reasons. In the first place, they are actually loaded with and carrying interstate commerce, and the cars themselves are devoted to that purpose. In the second place, the law definitely fixes the time of the delivery of an interstate shipment by the consignor to the carrier as the time of the commencement of the interstate movement of the shipment and the delivery by the carrier to the consignee as the termination of such movement. In other words, it is the transfer of possession from shipper to carrier which marks the beginning and the transfer of possession from carrier to consignee which marks the termination of the movement. As is said in Roberts on Federal Liabilities of Carriers, Section 539:

> "From the moment, therefore, that a shipment for a point in another state is accepted by a common car-

rier, that carrier is engaged in interstate commerce during the entire period from the time of acceptance at the point of origin until the shipment is finally delivered to and accepted by the consignee at the point of destination."

In the instant case there was no transfer of possession to mark the beginning or the end of the interstate movement of these cars. They were at all times in the possession of the respondent. No bill of lading was issued and no contract of any kind was entered into governing their movement. Ehrman and Ratcliffe were in no sense consignor and consignee. They acted merely as agents for the respondent. The fact that their names appear on the cards which were tacked onto the sides of the cars does not change the situation in the slightest degree. We submit it to be the law that when empty cars, in the possession of their owner, are sent from one state to a general terminal in another for repairs, their interstate movement terminates when they arrive at the terminal and are switched out of their train and placed on storage tracks to await their turn to be repaired. Their subsequent movement from the storage track to the particular place where the repairs are to be made is a purely local movement.

The only loaded car in the cut which was placed on shop track No. 2 on the evening of November 27th or the morning of November 29th was C. & O. 61355. This car left Russell, however, at 6:45 o'clock on the evening of November 28th. The petitioner was not injured until

about 6 o'clock on the morning of November 29th, and this car, consequently, could not have been in the cut of cars which was being moved. No doubt can exist but that this car left Russell at the time stated. This was shown by the wheel report of the conductor of the train in which it was moved. It may be urged that, because of the possibility of human error, the conductor may have been mistaken in including this car on his wheel report among those comprising his train. This might be true if the question were dependent wholly upon the correctness of a single wheel report. In the course of its movement over the main and branch lines of the defendant company from Russell to its destination at Surveyor, however, this car was moved by six different trains. The wheel reports of the conductors of each of those trains disclosed the presence of this particular car in their respective trains. It was set out from the train in which it left Russell at Barboursville, West Virginia, and picked up by a train which left Huntington at 6:35 a. m. on November 29th (R. 70). This could not possibly have happened had it still been at Russell, Kentucky, at the time of plaintiff's injury, and in like manner it would have been impossible for this car to have been in any of the trains in which it was shown to have been moved by the wheel reports, had any of these records been incorrect. The record of the movement of the car from Russell to point of destination was absolutely complete and consistent. It is utterly inconceivable that all six of the conductors could have made

a mistake in entering the same identical car on their wheel reports if it had not, in fact, been included in their trains.

Conley, the conductor of the switching crew, was shown the repair list of the twenty-one cars which were on shop track No. 2 at 9 o'clock on the morning of November 28th, and was asked whether those were the cars which were removed from that track on November 29th, and he replied in the affirmative (R. 4, 9, 75). His attention was not particularly directed to car C. & O. 61355, and he obviously intended to do no more than identify the list which had been made by the foreman of the repair gang as the list including the cars which he moved. He specifically stated (R. 75): **"These cars were empty."** His testimony cannot, therefore, be construed as saying that any car loaded with sand was included in those that he moved.

In Rice v. Baltimore & O. R. Co., 42 F. (2d) 387, 389, relied upon by petitioner, an effort was made to show that certain cars, thereafter loaded and consigned for interstate shipment, were in the movement in connection with which the plaintiff was injured. The Court say:

> "But the evidence most clearly shows that none of these cars were in the Lumberport-Haywood movement; that they had been placed at the Dawson mine some hours before the accident. What there is in the testimony to throw any doubt on the certainty of this conclusion is so vague and inconclusive as to be negligible for any purpose. It is also shown that at about 10 o'clock, or about four hours after Rice's

injury and on the return trip of Rice's crew, seven empties were delivered to the Corona mine, which were loaded in the afternoon and thereafter weighed and billed and consigned for interstate shipment. The evidence that any of these Corona cars was in the cut at the time of the accident is so scant as to make such a conclusion very speculative: The fact question upon which there is even a conflict in testimony, being the existence of jurisdiction, should affirmatively and distinctly appear."

The petitioner seeks to gloss over the question as to whether the evidence, in fact, showed that he was engaged in interstate commerce by the statement, on page 23 of his brief, that the general verdict of the jury conclusively established in his favor the issue that he was employed in interstate commerce at the time that he sustained his injury. The record does not bear him out. There was nothing to indicate whether the jury's verdict was based on the first or the second paragraph of complaint. With equal plausibility, therefore, it might be said that the verdict conclusively established in his favor the issue tendered by the second paragraph of complaint to the effect that he was engaged, not in interstate, but in intrastate commerce.

POINT V.

A Verdict for Respondent Should Have Been Directed Because the Only Evidence Upon Which a Verdict for Petitioner Could Rest Was His Own Testimony, Which Was in Direct Conflict With Undisputed Physical Facts.

The case was recognized by the trial court (R. 103) as being bottomed on the theory that respondent was guilty of a violation of the Safety Appliance Act and orders of the Interstate Commerce Commission in the first two particulars charged in the complaint, that is, that the handle of the uncoupling lever descended to within less than eighteen inches of the rail and that this handle dropped more than fifteen inches over all.

The petitioner, in support of these allegations, testified that when he took hold of the handle of the lever it was three (3) feet above the top of the rail and that he pushed it down a distance of fully two (2) feet and to a point within twelve (12) inches of the rail (R. 53, 57, 58). It is, of course, the general rule that a court of error will not weigh conflicting evidence and that, where there is any evidence at all to support a verdict, the same will not be disturbed on appeal. There are, however, certain recognized exceptions to this general rule. One of these is that where the verbal testimony of a witness is in conflict with the undisputed physical facts such testimony is of no weight in support of the verdict.

Pennsylvania R. Co. v. Chamberlain, 53 S. Ct. Rep. 391, 394, 77 L. Ed. Adv. 503, 506;

Hickey v. Missouri P. R. Co., 8 F. (2d) 128, 131 (C. C. A. 8th Cir.);
Atchison etc. R. Co. v. McNulty, 285 Fed. 97, 101 (C. C. A. 8th Cir.);
Waters-Pierce Oil Co. v. Van Elderen, 137 Fed. 557, 569 (C. C. A. 8th Cir.);
Southern R. Co. v. Smith, 86 Fed. 292, 296 (C. C. A. 5th Cir.);
Henry v. Providence etc. Co., 90 Atl. 168, 169 (R. I.);
Louisville etc. R. Co. v. Chambers, 165 Ky. 320, 178 S. W. 1041;
Hudson v. Rome etc. R. Co., 145 N. Y. 408, 40 N. E. 8, 9;
Samulski v. Menasha Paper Co., 147 Wis. 285, 133 N. W. 142, 145;
McGlade v. City of Waterloo, 156 N. W. 680, 681 (Iowa);
Elliott on Railroads (3rd Ed. 1922), Sec. 2714, 26 R. C. L. 1070;
Larsen v. Northern Pac. R. Co., 241 N. W. (Minn.) 312, 313;
Hunter v. N. Y. etc. R. Co., 116 N. Y. 615, 23 N. E. 9, 10;
C. & O. R. Co. v. Anderson, 93 Va. 650, 25 S. E. 947;
Karras v. Great Northern R. Co., 167 Minn. 140, 208 N. W. 655, 656.

All of the physical facts with reference to the construction and manner of operation of the coupler and lever in controversy were undisputed and minutely described. The lever consisted of two pieces or arms, both attached to the end sill of the car on the same trunnion. The outer lever

extended inwardly a few inches beyond the trunnion and fitted underneath the inner lever. When the outer lever was pushed down it turned on the trunnion and raised the part extending past the trunnion, thereby raising the inner lever, which likewise turned on the trunnion. The two arms became, in effect, one lever. The inner arm was attached to a lift pin which passed through a hole in the top of the coupler and there connected with the lock block. When the lift pin and lock block were raised by the outer lever being pushed down the knuckles were released and the cars were permitted to uncouple. The inside vertical dimension of the coupler was approximately twelve (12) inches and the vertical dimension of the lock block was approximately eight (8) inches. The hole through which the lift pin entered the coupler was much smaller than the horizontal dimensions of the lock block, as a result of which the lock block could not come out of the coupler, but traveled entirely within it. The distance from the end of the handle of the outer lever to the trunnion was approximately the same as the distance from the trunnion to the point where the lift pin was attached to the inner lever. By the force of the most elementary principles of mathematics and physics, therefore, the handle of the outer lever could be pushed down only to the extent of the limit of the travel of the lock block in the coupler, or approximately a distance of four (4) inches. The petitioner was asked to explain how it happened that the handle of the lever de-

scended two (2) feet while the lock block was being raised four (4) inches. His explanation was as follows:

> "I know how it happened that the end of the lever was traveling two (2) feet while the lock block was traveling about four (4) inches; it depends on where it is coupled on the end sill and, the lever being bent, went on down. I didn't bend the lever any in the operation. The two arms of the lever must be about the same length; where they fastened on the end sill is about the middle of the distance from the knuckle lock to the end of the car; the outer end of the arm reaches past the lock to get the inner arm and this enabled the lever to travel down two (2) feet while the lock block was going up four (4) inches" (R. 58).

This explanation only manifested the utter impossibility of the petitioner's testimony being true. The location of the trunnion on the end sill would be wholly immaterial in determining the relative travel of the handle and the lock block so long as the two arms of the lever were of equal length. The fact that the lever may have been bent would likewise have no bearing on the extent of its travel compared with the limit of the travel of the lock block, so long as it was not bent in the operation. This, the petitioner says, was not done (R. 58). The truth is that the petitioner labored under the belief that a rule of the Interstate Commerce Commission provided that this handle should not descend more than fifteen inches and he testified that it went down two feet for the purpose of estab-

lishing a violation of that rule, when the admitted physical facts were such that a descent of the handle any such distance was utterly impossible. The petitioner's very explanation was self-destructive. As was said by the Supreme Court of Wisconsin in Samulski v. Menasha Paper Co., 147 Wis. 285, 133 N. W. 142, 145:

> "The testimony of a witness or finding of a jury, contrary to the unquestionable physical situations, or common knowledge, or conceded facts, is of no weight in favor of the side it is invoked to support, while it may be self-destructive—be successfully impeached by its utter improbability or impossibility."

The mute evidence of these physical facts was supported by the testimony of many witnesses. On the morning of the accident the coupler was tested and operated and measurements were taken. It not only operated perfectly and effected an uncoupling of the cars without difficulty, but the difference between the elevation of the handle with the lock block down and the handle up, and its elevation after the handle had been shoved down and the lock block raised, was found to be approximately four inches or the limit of the travel of the lock block in the coupler. Similar measurements and tests were made on subsequent occasions and always with the same result. The case, therefore, is one coming squarely within the rule above referred to. The rule is stated in Elliott on Railroads (3rd Ed., 1922), Section 2714, in the following language:

> "Notwithstanding the general rule, which prevails in most jurisdictions, that the Court, on appeal, will not weigh the evidence, neither the appellate court nor the trial court should stultify itself by allowing a verdict to stand, although there may be evidence tending to support it, where the physical facts are such as to demonstrate that such evidence is untrue and the verdict unjust and unsupported in law and in fact."

This rule has been frequently applied in the federal courts. It is announced in Hickey v. Missouri P. R. Co., 8 F. (2d) 128, 131 (C. C. A. 8th Cir.), as follows:

> "It must be conceded that, on the motion for a directed verdict, plaintiff was entitled to have taken in his behalf the most favorable view of the testimony. He was not entitled, however, to have credence given to testimony if it conflicted with plain physical facts. His claim that he looked at a certain point, and that no train was in sight, will not be given credence if the mathematical facts in the testimony given in his own behalf demonstrate the unsoundness of his claim."

We submit, therefore, that the petitioner's testimony that the handle descended a distance of two feet and to within twelve inches of the rail, being indirect conflict with undisputed physical facts, is of no weight in support of the verdict, and that this is especially true in view of the petitioner's explanation which is above set out. The testimony of every witness who measured the height of the handle of the lever above the rail or saw it measured

was to the effect that it did not come within eighteen inches of the rail, and in the absence of any credible testimony to the contrary the testimony of these witnesses must be taken as true.

It is true that a number of photographs of the car, with the coupler and lever attached, were introduced in evidence. They were before the Circuit Court of Appeals as physical exhibits. In some of the photographs the lever appears to be much lower with reference to other objects shown in the photograph than in some of the other pictures.

It is self-evident that the relative height on a photograph of two objects located at unequal distances from the camera depends almost altogether on the position of the camera at the time the picture is taken. If the lens of the camera is higher than a given object, that object will appear in a lower position in the picture than it actually is with reference to other more distant objects. This is borne out by the testimony of a number of witnesses, including a professional photographer. Credible evidence of accurate measurements of the distance of this lever above the rail cannot be impeached or contradicted by photographs which furnish no more than a basis for guesswork as to the height of the lever above the rail.

It might be contended that the handle of the lever was permitted to descend a distance of two feet because the "stop" above the inner lever, which respondent claimed was designed to arrest its upward movement was, as he

contended, bent upwards, so that there was three or four inches clearance between the stop and the lever. The lock block, in its upward movement in the coupler, necessarily comes to a halt when it comes in contact with the top of the coupler. If the "stop" is so placed as to arrest this upward movement before the lock block meets the top of the coupler the limit of travel of the lock block and consequently that of the handle of the lever is reduced below the four inches permitted by the inside dimensions of the coupler. If the "stop" is not so placed the lock block could move upwardly and the handle of the lever could move downwardly, or inwardly for that matter, only the four inches permitted by the limit of movement of the lock block in the coupler.

The four remaining violations of the Safety Appliance Act which are alleged in the complaint to have been the proximate cause of petitioner's injuries are: That the lock pin was prevented from releasing the coupler and uncoupling the cars by reason of the bent, twisted and defective condition of the lever; that the coupler was prevented from uncoupling the cars without the necessity of a man going between the ends of the cars by reason of such condition of the lever; that the coupler could not be uncoupled without the necessity of a man going between the cars, and that the couplers did not couple automatically by impact.

It was apparently the theory of the first three of these charges that the failure of the cars to uncouple was the

cause of the accident, presumably on the ground that the plaintiff was obliged to go between the cars to effect the uncoupling by some means other than the operation of the lever. It was the theory of the last charge that the failure of the cars to couple automatically by impact was in some manner responsible for the accident.

So far as this last charge is concerned, there is not the slightest evidence that the cars ever failed to couple by impact. They had been coupled together in this manner immediately before they were removed from shop track No. 2. Furthermore, the plaintiff was not engaged in any attempt to couple the cars, and their inability to couple automatically by impact, even if such condition had existed, could have had no possible connection with the accident.

Nor was there any evidence that any failure of the cars to uncouple was in any way responsible for the accident. Neither the petitioner nor anyone else went in between the cars to effect an uncoupling. The petitioner made but the one attempt to uncouple the cars, and that attempt was made by pushing down on the lever as he walked or ran beside the train (R. 58). The forward car, it is true, was not in fact uncoupled at the time the plaintiff attempted to operate the lever. That fact, however, is not sufficient to establish any defect in the coupler in the face of the testimony that after the accident the coupler was subjected to repeated tests and that in each instance the cars were properly uncoupled (Curran v. Chicago Short

Line Ry. Co., 198 Ill. App. 154, writ of error dismissed 246 U. S. 655). The failure of the cars to uncouple, however, was not in the slightest degree responsible for the petitioner's injuries. He was operating the lever on the second car in an attempt to uncouple the leading car. It was the wheels of the second car which ran over his hand, and the fact that the leading car was still attached to the second car had no connection whatever with the accident.

Not only did no failure of the cars to couple or uncouple have any connection with petitioner's injuries, but there was no bend or defect in the lever which could have prevented a coupling or uncoupling of the cars or have been, in any other manner, responsible for the accident. The lever was not a straight piece of metal, but certain curves and bends were fabricated in it at the time it was manufactured. This was done in order to make it fit the end sill on the particular type of car to which it was applied. It was not disputed, however, that there did exist a further bend at the eye where the lever fitted over the trunnion. This bend, however, was a transverse or lateral bend which did not have the effect of making the handle come closer to the rail. It did not render the lever inoperative or make it dangerous. Its only effect was to throw the handle slightly forward and away from the end sill. The petitioner's own testimony with reference to this bend in the lever shows conclusively that it had nothing to do with the accident. He testified that he had not observed the bend when he first took hold of the lever with

his left hand, and that he experienced little difficulty in taking hold of it (R. 58, 59). If the lateral bend in the lever had been a matter of consequence, it would have thrown the handle into a position where he would not have expected to find it, and its condition would have necessarily been brought to his attention at the outset. Since he found the handle approximately where he expected it to be and had no difficulty in taking hold of it, its downward descent for the distance of the four inches permitted by the travel of the lock block in the coupler could not have had any possible connection with the accident. The bend could not possibly have prevented the lock block or pin from releasing the knuckle of the coupler or have prevented an uncoupling of the cars. Nor could the bent condition of the lever have prevented the coupler from being uncoupled without the necessity of a man going between the ends of the cars in order to effect the uncoupling. The lever and coupler were operated time and again after the accident, without any change or repairs having been made, all without the necessity of any man going between the ends of the cars.

The respondent, of course, was not called upon to explain the exact manner in which the accident occurred. The petitioner may have missed the lever altogether. His hand may have slipped off the handle. He may have stumbled as he walked or ran beside the train. The accident may have occurred in many ways, but it is certain that the record in this case contains no credible evidence that the

defendant was guilty of any of the violations of the Safety Appliance Act or the orders of the Commission mentioned in the complaint or that any such violation was in any way responsible for the petitioner's injury.

POINT VI.

The District Court Erred in Charging the Jury That the Safety Appliance Act and the Rules of the Interstate Commerce Commission Required That the Handle of the "Push-Down" Type of Uncoupling Lever in Controversy Should Have a Maximum Drop of Fifteen Inches and That if Respondent Violated This Requirement as to the Maximum Movement of Such Handle the Petitioner Was Entitled to Recover, for the Reason That no Such Requirement was Contained Either in Such Act or Such Rules.

In the course of the Court's charge the jury were told that the respondent was charged in the complaint with using a push-down type uncoupling lever and handle thereof, which, when operated in the usual way, dropped more than fifteen inches over all; that a rule of the Interstate Commerce Commission provided that handles of uncoupling levers should have a minimum drop of twelve inches and a maximum of fifteen inches over all, and that the serious question in the case for the jury to determine was the question of whether or not the respondent violated the Safety Appliance Act in that it did not have an uncoupling lever that complied with the Safety Appliance Act and rules of the Interstate Commerce Commission

with reference to the height above the rail and the maximum movement of the handle of the uncoupling device. They were further charged that if the respondent did violate that rule, or a provision of the Safety Appliance Act, and the petitioner's injury was the proximate result of such violation, then the petitioner was entitled to recover. In other portions of the charge the jury were told that under the Safety Appliance Act there was no question for them to consider with reference to either assumption of risk or contributory negligence. The jury were, therefore, told that if the handle of the uncoupling lever dropped more than fifteen inches the respondent had violated the provisions of the Safety Appliance Act and the orders of the Interstate Commerce Commission, and that if such violation was the proximate cause of the petitioner's injury he was entitled to recover.

The respondent excepted to this portion of the charge telling the jury that they should find for the petitioner if the lever in question dropped more than fifteen inches over all, for the reason that there was no provision in the Safety Appliance Act, or any regulation promulgated pursuant thereto by the Interstate Commerce Commission, which contained any such requirement with reference to this kind of a lever.

The order or rules of the Commission establishing standards for uncoupling levers was promulgated on March 13, 1911, and together with "Plate B," herein referred to, is as follows:

"Uncoupling Levers:

"Number: Two (2).

"Uncoupling levers may be either single or double, and of any efficient design.

"Dimensions: Handles of uncoupling levers, except those shown on Plate B, or of similar designs, shall be not more than six (6) inches from sides of car.

"Uncoupling levers of design shown on Plate B and of similar designs shall conform to the following prescribed limits:

"Handles shall be not more than twelve (12), preferably nine (9), inches from sides of cars. Center lift arms shall be not less than seven (7) inches long.

"Center of eye at end of center lift arm shall be not more than three and one-half (3½) inches beyond center of eye of uncoupling pin of coupler when horn of coupler is against the buffer block or end sill. (See Pl. B.)

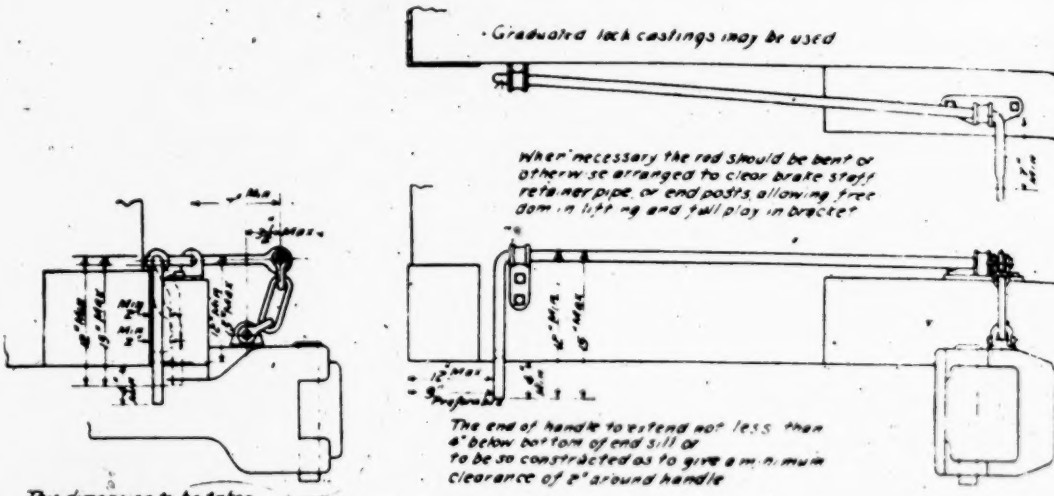
"Ends of handles shall extend not less than four (4) inches below bottom of end sill or shall be so constructed as to give a minimum clearance of two (2) inches around handle. Minimum drop of handles shall be twelve (12) inches; maximum, fifteen (15) inches over all. (See Pl. B.)

"Handles of uncoupling levers of the 'rocking' or 'push-down' type shall be not less than eighteen (18) inches from the top of rail when lock block has released knuckle, and a suitable stop shall be provided

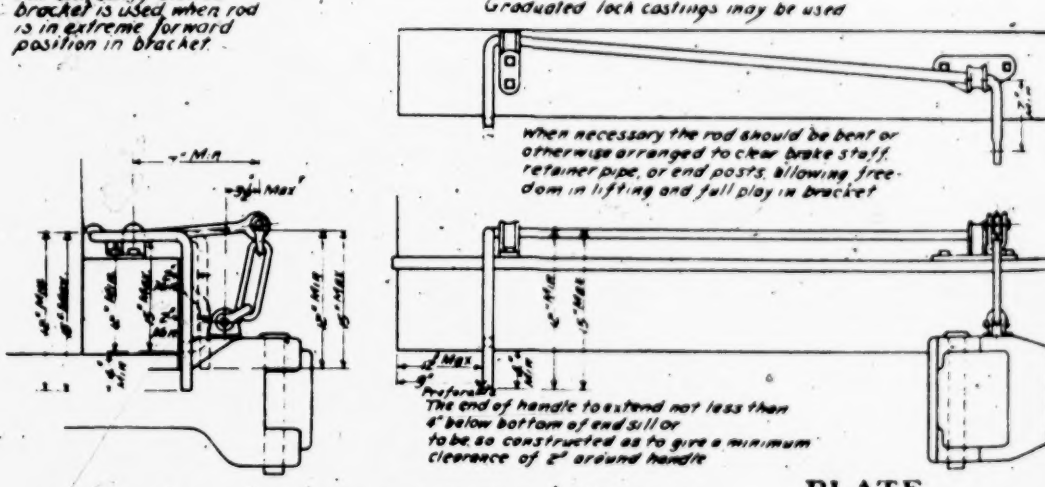
to prevent inside arm from flying up in case of breakage.

"Location: One (1) on each end of car.

"When single lever is used, it shall be placed on left side of end of car."



Application to concealed endsill cars



Application to outside endsill cars

PLATE B

It will be observed that this order deals with two separate and distinct types of uncoupling levers. One type is known as the lift-up type. This is the type which is shown on Plate B. With reference to this type of levers it is provided that "minimum drop of handles shall be twelve (12) inches; maximum, fifteen (15) inches over all." The order shows beyond all question that this provision applies only to the lift-up type of levers shown on Plate B, for the words "(See Pl. B)," follow immediately after the provision referred to. Following this provision there appear the requirements with reference to the handles of uncoupling levers of the "rocking" or "push-down" type. It is required that these shall not be less than eighteen (18) inches from the top of rail when lock block has released knuckle, and a suitable stop shall be provided to prevent inside arm from flying up in case of breakage. As to these levers, there is no requirement whatever to the effect that the minimum drop of handles shall be twelve (12) and the maximum drop of handles fifteen (15) inches over all. Indeed, such a requirement would be impossible of fulfillment, because, owing to the fact that the travel of the handle of the lever is limited by the travel of the lock block in the coupler, which, as above explained, is approximately four (4) inches, it would be impossible to provide couplers having a minimum drop of twelve (12) inches. The Court did not stop at telling the jury that rules of the Interstate Commerce Commission required that this push-down type of lever

should have a maximum drop of fifteen (15) inches over all, when, in fact, the lever was subject to no such requirement whatever. He went further and told them that **the serious question in this case for them to consider was whether the respondent had violated this rule with reference to the maximum movement of the handle of the uncoupling device**, and that if it did violate it, the petitioner was entitled to recover. It will be recalled that the petitioner testified that the handle was three feet above the rail when he first took hold of it (R. 57, 58). In view of the testimony of many witnesses, testifying on behalf of respondent, to the effect that the handle was nineteen or twenty inches above the rail when the lock block had released the knuckle, there was ample evidence from which the jury might have concluded that the handle did descend more than fifteen inches and yet not come within eighteen inches of the rail. They might well have felt that, there being nothing to distract petitioner's attention at the time he first took hold of the lever, his recollection as to its height above the rail at that time was correct, and that accepting as true the testimony of respondent's witnesses as to its height above the rail with the lock block up and the handle down, there was still a violation of the requirement with reference to the fifteen-inch drop.

Should it be contended here, as it was before the Circuit Court of Appeals, that the effect of the charge was to impose upon petitioner the burden of proving both that the

handle dropped more than fifteen inches and that it came to within less than eighteen inches of the rail, the bare contention carries its own refutation. From the inception of the case the petitioner sought to recover on two principal grounds, namely, the first two alleged violations of the Safety Appliance Act set forth in each paragraph of his complaint. He charged that the handle of the lever descended to a point less than eighteen inches above the top of the rail and he charged that the handle of the lever dropped more than fifteen inches over all. The two charges were independent of each other and in no sense dependent upon each other. The handle of the lever might come within eighteen inches of the rail without descending as much as fifteen inches. It might descend fifteen inches without coming within eighteen inches of the rail. The Court, recognizing that the plaintiff relied primarily upon these two charges of negligence, emphasized them in equal degree by saying:

> "The serious question in this case for you to consider is the question of whether or not the defendant violated the Safety Appliance Act, the uncoupling act in that it did not have an uncoupling lever that complied with the Safety Appliance Act and the rules of the Interstate Commerce Commission with reference to the height above the rail and the maximum movement of the handle of the uncoupling device. If you find the defendant did violate that rule or a provision of the Safety Appliance Act and the petitioner's injury was the proximate result of such violation, then the

petitioner is entitled to recover in this case" (R. 103, 119).

The effect of this charge was not to tell the jury that the plaintiff could recover only in event that the defendant had violated both of the requirements referred to. A law, rule or order is, of course, violated if any of its provisions are violated. The very suggestion that anyone, lawyer or layman, would understand that a law or order could be violated only by violating each one of its provisions is so absurd as to require no further notice.

The fact that the giving of this charge was prejudicial and reversible error is so apparent that further argument or the citation of authorities would seem to be unecessary. The case of Davis, Director General, v. Manry, 266 U. S. 401, is, however, directly in point. In that case the trial court charged the jury that the Safety Appliance Act required that all cars having ladders should be equipped with grab irons; that this applied to a tender of a locomotive, though it had no roof, and that if the petitioner's injury was due to the absence of a grab iron he was entitled to a verdict. This was excepted to on the ground that the statute did not apply to ladders on a tender, and, as the Court said, "the issue there was as to the effect of the statute." This Court held that the provisions of the Safety Appliance Act in question had no application to tenders, and that, therefore, the trial court erred in its charge on the effect of the statute. The Court further

held that, as the verdict was general, with no special finding upon which the verdict could stand without response to the statute, the case must go back for a new trial. In the case at bar, also, the verdict was general. There was no special finding on which it could stand without response to the requirement in question, and nothing in the record to show that it was not based on the alleged violation of this particular provision.

If a charge to a jury, to the effect that a statute imposed upon a defendant a certain obligation, and that if he violated the same the plaintiff was entitled to recover, does not constitute prejudicial and reversible error, when, in fact, the statute imposed no such obligation, then we are unable to conceive how prejudicial or reversible error could possibly be committed.

CONCLUSION.

Petitioner's complaint is directed primarily to certain language used in the opinion of the Circuit Court of Appeals and the instructions contained in its mandate with reference to the manner in which the complaint might be amended. This language and these instructions, if erroneous, can be corrected in such opinion as this Honorable Court may render. They constitute no ground for the reversal of the judgment of the Circuit Court of Appeals or the reinstatement of the judgment of the District Court. The record is devoid of the meager degree of proof required to establish either that petitioner was engaged in

interstate commerce or that respondent was legally responsible for his injury. More than this, for aught that appears in the record, the judgment rests on the second paragraph of complaint, over which the District Court was clearly without jurisdiction; and, finally, for aught that appears in the record, the jury's verdict was based on the ground that, in using the lever in question, respondent had violated an order of the Interstate Commerce Commission requiring that it should have a maximum drop of fifteen inches, and was the direct result of the erroneous charge of the Court. Because of these manifest and prejudicial errors, the judgment of the District Court cannot stand.

Respectfully submitted,

ALBERT H. COLE,
Counsel for Respondent.

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Supreme Court of the United States.

OCTOBER TERM, 1933.

No. 173.

JAMES B. MOORE,
Petitioner,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Respondent.

RESPONDENT'S MEMORANDUM IN ANSWER TO THE CONTENTION THAT IT HAS WAIVED OBJECTIONS TO THE JURISDICTION OF THE DISTRICT COURT.

ALBERT H. COLE,
Peru, Indiana,
Counsel for Respondent.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1933.

No. 173.

JAMES B. MOORE,
Petitioner,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Respondent.

RESPONDENT'S MEMORANDUM IN ANSWER TO THE CONTENTION THAT IT HAS WAIVED OBJECTIONS TO THE JURISDICTION OF THE DISTRICT COURT.

May It Please the Court:

In his reply brief, the petitioner contends that the respondent, by what is claimed to have been a general appearance, has waived the objections which it interposed to the jurisdiction of the trial court. In order that there may be placed before the Court the reasons why respondent insists that there was no such waiver, together with the authorities supporting the same, respondent asks leave to submit the following memorandum.

SUMMARY OF ARGUMENT.

POINT I. **No Question of the Jurisdiction of the District Court, General or Territorial, With Respect to the Cause of Action Declared Upon in the First Paragraph of Complaint, Was Waived by the Filing of the First Paragraph of the Plea in Abatement. On the Contrary, Respondent Adopted the Only Course Which Would Have Saved Its Rights.**

POINT II. **The Objection That the Action Declared Upon in the Second Paragraph of Complaint Could Not Be Maintained Against Respondent in the District Court in Which the Same Was Instituted Was Not Waived by the Filing of the Second Paragraph of the Plea in Abatement, Because:**

(1) **The plea in question did not seek to question the jurisdiction of federal courts generally over the subject matter of the action, but challenged merely the territorial jurisdiction or venue of the District Court for the Northern Division of Indiana, Ft. Wayne Division.**

(a) **It admitted that respondent was a citizen and alleged that it was an inhabitant of Virginia, and denied that petitioner was a resident of the Northern District of Indiana or a citizen of that state, to show that the action could not be maintained in the District Court at Ft. Wayne, even if jurisdiction were founded solely on the ground of diversity of citizenship.**

(b) It did not allege that respondent was a citizen of the same state of which it was a citizen, and only by allegation and proof of such fact could want of jurisdiction of federal courts generally over the subject matter of the action be established, so far as the ground of diversity of citizenship was concerned.

(c) The evidence introduced by respondent in support of this plea (R. 29 to 32) was not for the purpose of establishing the fact that the parties were citizens of the same state, but for the purpose of establishing the fact that petitioner was a resident of Ohio and respondent a resident of Virginia. Its effect was to affirm diversity of citizenship as one of the grounds of the jurisdiction of federal courts generally over the subject matter of the action, but to insist that the particular District Court was without jurisdiction because the action was not brought in the district of the residence of either party.

(d) Not only did the plea and evidence offered in its support affirm, instead of deny, diversity of citizenship as a ground of federal jurisdiction, but it asserted an additional ground of federal jurisdiction over the subject matter of the action, namely, that the suit arose under a law of the United States, and on this very ground maintained that the respondent could be sued only in the district of its residence.

(2) Even had the plea expressly challenged the jurisdiction of federal courts over the subject matter of the action, that fact would have constituted no waiver of objections, presented concurrently therewith, as to the venue or the territorial jurisdiction of the court in which the suit was brought.

ARGUMENT.

POINT I.

No Question of the Jurisdiction of the District Court, General or Territorial, With Respect to the Cause of Action Declared Upon in the First Paragraph of Complaint, Was Waived by the Filing of the First Paragraph of the Plea in Abatement. On the Contrary, Respondent Adopted the Only Course Which Would Have Saved Its Rights.

Petitioner's first paragraph of complaint expressly invoked the jurisdiction of federal courts on two grounds. The first was that the suit arose under the Federal Employers' Liability Act. That act expressly confers upon district courts jurisdiction over suits coming within its terms, and further provides that a defendant may be sued in the district in which it may be doing business at the time of commencing the action. One of the facts necessary to bring the suit within the provisions of this statute, and hence within the jurisdiction of the district courts, is that the plaintiff or decedent, as the case might be, was employed by the defendant in interstate or foreign commerce at the time of receiving his injury. It was respondent's contention that the petitioner was not so employed and that proof of such fact would defeat the jurisdiction of the district court, in so far as it might depend upon the fact that the suit came within the provisions of the Employers' Liability Act. The other ground upon which fed-

eral jurisdiction was invoked was that the suit arose under another law of the United States, namely, the Safety Appliance Act. So far as jurisdiction was founded upon this ground, however, the suit could be brought only in the district of the respondent's residence. If respondent went to trial without raising the question that, in so far as jurisdiction might depend upon the fact that the suit arose under the Safety Appliance Act, the same could not be maintained in the District Court at Ft. Wayne, Indiana, the question would have been waived and, upon failure of proof to bring the case within the provisions of the Federal Employers' Liability Act, respondent might have been subjected to a judgment in the District Court for the Northern District of Indiana, Ft. Wayne Division, on the ground that a case had been made under the Safety Appliance Act even though the petitioner was engaged in intrastate commerce, and that jurisdiction had properly attached because the suit arose under a law of the United States and respondent had waived its right to be sued only in the district of its residence. An answer going no farther than to assert that, in so far as the suit arose under the Safety Appliance Act, the same might be brought only in the district of respondent's residence, would have been clearly insufficient. Another ground of federal jurisdiction, under a law authorizing the bringing of the suit in a district where respondent was doing business, would have remained unchallenged.

Respondent adopted the only course which was open to

it. It denied that petitioner was employed in interstate commerce. The effect of this denial was to assert that the suit did not come within the provisions of the Federal Employers' Liability Act, and that jurisdiction could not exist on that ground. It further asserted that, in so far as the action arose under the Safety Appliance Act, the same could not be brought in any district other than that of its residence.

We respectfully submit that the filing of this plea constituted no waiver of any objection as to jurisdiction, but, on the contrary, stated facts sufficient to abate the action declared upon in the first paragraph of the complaint.

POINT II.

The Objection That the Action Declared Upon in the Second Paragraph of Complaint Could Not Be Maintained Against Respondent in the District Court in Which the Same Was Instituted Was Not Waived by the Filing of the Second Paragraph of the Plea in Abatement.

It is petitioner's apparent contention that respondent waived all objection to the fact that the District Court below had no jurisdiction to try and determine the suit declared upon in the second paragraph of complaint on account of the fact that it could be brought only in the district of respondent's residence, upon the theory that the second paragraph of its plea in abatement questioned the jurisdiction of the Court over the "subject matter of the

action," and that all questions of venue or territorial jurisdiction were thereby waived.

It will be noted that, as is said by Mr. Hughes in his work on Federal Practice (Sec. 2081): "Jurisdiction, in the sense of being the authority to decide the cause, may be regarded as conditioned threefold upon: (1) The power to hear and determine generally in respect of the subject matter; (2) authority over the defendants by the service of process, and (3) authority with respect to the territory or venue." No question of insufficient or irregular service of process is involved in this case. The jurisdictional objection, so far as the second paragraph of complaint is concerned, is one of improper venue or an absence of territorial jurisdiction. The similarity of jurisdiction over the subject matter and venue is pointed out by Mr. Hughes in section 2223 of his work in these words: "This prohibitory clause (the general venue statute) and the grant of jurisdiction or power to take cognizance are alike in this: That if the suit is not brought in the proper district the Court where it is erroneously brought has no more right to hear and determine it, nothing else appearing, than it has to hear and determine it if it is not of the character prescribed by the grant."

There is, of course, no doubt but that a defendant may waive the objection that he has been sued in a district other than that prescribed by statute. It is respondent's contention in this case, however, that the second paragraph of its plea in abatement did not challenge jurisdic-

tion over the subject matter of the action, that is, the jurisdiction of federal courts generally, but that, if it had, it would have constituted no waiver of its objection to the territorial jurisdiction of the court in which the suit was brought.

(1) **The plea in question did not seek to question the jurisdiction of federal courts generally over the subject matter of the action, but challenged merely the territorial jurisdiction or venue of the District Court for the Northern Division of Indiana, Fort Wayne Division.**

(a) **It admitted that respondent was a citizen and alleged that it was an inhabitant of Virginia, and denied that petitioner was a resident of the Northern District of Indiana or a citizen of that state, to show that the action could not be maintained in the District Court at Fort Wayne, even if jurisdiction were founded solely on the ground of diversity of citizenship.**

The petitioner only claimed to have become a resident of Fort Wayne, Indiana, two days before the suit was filed (R. 35). His wife and children still lived in property owned by him in Portsmouth, Ohio. Respondent was convinced that petitioner was what was termed by this Court in Morris v. Gilmer, 129 U. S. 315, "a mere sojourner." Under such circumstances, even if diversity of citizenship had been the sole ground of federal jurisdiction, the action could not be maintained in the Northern District of Indiana, Fort Wayne Division, because that was not the dis-

trict of the residence of either the plaintiff or defendant. Respondent accordingly admitted and averred that it was a citizen and inhabitant of Virginia and denied that petitioner was a resident of the Northern District of Indiana, or the Fort Wayne Division therein, or a citizen of Indiana. This was not for the purpose of showing that the parties were not citizens of different states, but for the purpose of showing that the district in which the suit was brought was not the district of the residence of either of the parties.

(b) **It did not allege that respondent was a citizen of the same state of which it was a citizen, and only by allegation and proof of such fact could want of jurisdiction of federal courts generally over the subject matter of the action be established, so far as the ground of diversity of citizenship was concerned.**

No attempt was made to allege that petitioner was a citizen of Virginia, of which state respondent was admittedly a resident and citizen. The fact that petitioner resided elsewhere than in the Northern District of Indiana, Fort Wayne Division, had no bearing on the jurisdiction of federal courts generally over the subject matter of the action, unless he resided in and was a citizen of Virginia. Such fact, if true, however, was fatal to the territorial jurisdiction of the District Court of such district, even had there been no ground of federal jurisdiction other than diversity of citizenship.

(c) **The evidence introduced by respondent in support of this plea** (R. 29 to 32) **was not for the purpose of establishing the fact that the parties were citizens of the same state, but for the purpose of establishing the fact that petitioner was a resident of Ohio and respondent a resident of Virginia. Its effect was to affirm diversity of citizenship as one of the grounds of the jurisdiction of federal courts generally over the subject matter of the action, but to insist that the particular District Court was without jurisdiction because the action was not brought in the district of the residence of either party.**

Not only did the plea contain no averments calculated to show that the parties were citizens of the same state, but the evidence introduced by respondent in its support was offered for the purpose of showing that respondent was a resident of Virginia (R. 33) and that petitioner was a resident of Ohio (R. 29-33). This is the very evidence, the introduction of which is claimed to have amounted to a voluntary submission by respondent to the jurisdiction of the Court. Its only purpose was to show that the venue was improperly laid and that the Court was without territorial jurisdiction. It could not defeat jurisdiction over the subject matter of the action. The fact that it might disclose that the petitioner was a citizen of a state other than that alleged in his complaint would be of no moment, so far as the question of jurisdiction over the subject matter of the action was concerned, so long as it appeared that the parties were citizens of different states. This is

true by reason of the provisions of 28 U. S. C. A. 399 (Judicial Code, Section 274-C), providing for amendments where diverse citizenship in fact existed, though defectively alleged.

The mere fact that the plea denied that petitioner was either a resident of the Northern District of Indiana or a citizen of that state does not render it ineffective as a plea questioning solely the territorial jurisdiction of the District Court. The distinction between terms "inhabitant," "resident" and "citizen" as used in the Judicial Code is none too clear. The books are full of cases in which a defendant successfully objected to being sued in a district other than that of his residence, or, if diversity of citizenship was the sole ground of federal jurisdiction, the district of the residence of either the plaintiff or the defendant, on the ground that neither the defendant, nor the plaintiff or defendant, as the case might be, was a "resident" or "citizen" of such district or the state in which it was located. Among these cases are Davidson Marble Co. v. Gibson, 213 U. S. 10, and Southern Pacific Co. v. Arlington Heights Fruit Co., 191 Fed. 101 (C. C. A., 9th Cir.), to which reference will be later made.

Nor does the fact that the "wherefore" clause of the plea asserted that "**this** Court has no jurisdiction over **this action,**" render the plea other than one challenging the territorial jurisdiction of the particular court in which the action was brought over this particular proceeding. It was not alleged that there was a want of federal jurisdic-

tion generally or that the Court had no jurisdiction over the subject matter of the action. Both courts and lawyers frequently refer to a court as being without jurisdiction over an action when the venue is improperly laid. In Massachusetts Bonding etc. Co. v. Concrete Steel Bridge Co., 37 F. (2d) 695 (C. C. A. 4th Cir.), relied on by petitioner, the Court, on page 699, say:

> "In practically all instances where the Supreme Court has held against the **jurisdiction** of the federal court **over suits** against foreign corporations doing business in the state where the suit was brought, it has been because neither party was a citizen of the state."

Jurisdiction over suits is used in the sense of territorial jurisdiction over the particular actions in controversy and it may be added the term "citizen" is used in the sense of resident.

(d) **Not only did the plea and evidence offered in its support affirm, instead of deny, diversity of citizenship as a ground of federal jurisdiction, but it asserted an additional ground of federal jurisdiction over the subject matter of the action, namely, that the suit arose under a law of the United States, and on this very ground maintained that the respondent could be sued only in the district of its residence.**

Finally, it cannot conceivably be claimed that the plea in question could be construed as denying the jurisdiction

of federal courts generally over the subject matter of the action, because this plea expressly pointed out another ground of jurisdiction over the subject matter of the action, and insisted that by reason of that very fact the action, while within the jurisdiction of federal courts, could be brought only in the district of the respondent's residence.

(2) **Even had the plea expressly challenged the jurisdiction of federal courts over the subject matter of the action, that fact would have constituted no waiver of objections, presented concurrently therewith, as to the venue or the territorial jurisdiction of the court in which the suit was brought.**

While a general appearance, such as a plea to the merits, amounts to a waiver of any objection as to venue, concurrently or thereafter made, it is not the law that a plea challenging both general and territorial jurisdiction operates as a waiver of questions as to the latter, and the authorities cited by petitioner do not so hold.

Fitzgerald Construction Company v. Fitzgerald, 137 U. S. 98, was an action instituted in a state court in Nebraska by a Nebraska citizen against an Iowa corporation. Summons was served upon one described in the return as "the president and managing agent" of the defendant company. An order of attachment was issued and a garnishee summons was issued and served upon a garnishee defendant. The principal defendant demurred to the peti-

tion upon the grounds of insufficiency, misjoinder and defect of parties and then removed the cause to the federal court. It there filed an answer and an amended answer, by which it answered fully as to the merits, and later endorsed on the amended answer a paragraph to the effect that the Court was without jurisdiction. After a trial before a jury had been in progress for two days the defendant interposed a plea to the jurisdiction of the Court on the ground of defective or fraudulent service. It was, of course, held that after fully answering to the merits the objections to the jurisdiction came too late.

In Mahr v. Union Pacific Ry. Co., 140 Fed. 921, it was held that objections going merely to the sufficiency of the service were waived by a challenge to the Court's jurisdiction over the subject matter of the action.

McComb et al. v. U. S. Housing Corporation, 264 Fed. 589, is not in point. No question of waiver is involved and the opinion relates merely to an order of a district court to the effect that certain jurisdictional questions would not be decided upon a mere preliminary motion, purporting to be made upon a special appearance, but that consideration thereof would be deferred until all material facts were before the Court.

Elliott v. Lawhead, 43 Ohio St. 171; 1 N. E. 577, like the Mahr case, involved no question of waiver of objections to territorial jurisdiction. This case merely holds that an objection based on the "want of legal and proper service"

is waived by a challenge to the Court's jurisdiction over the subject matter on the ground that a court of equity has no jurisdiction over an action for debt.

We submit, therefore, that there are no authorities holding that objections as to the venue or territorial jurisdiction of the Court are waived by contemporaneous objections to jurisdiction over the subject matter. There is, however, ample authority to the contrary.

The case of Davidson Bros. Marble Co. et al. v. United States on the relation of Gibson, 213 U. S. 10, was an action brought in the Circuit Court for the Northern District of California against an Illinois corporation and two citizens and residents of that state to recover upon a bond given to secure the performance of a contract for Government work. The defendants were personally served in Illinois. They appeared specially and filed a demurrer and a motion to quash service and to dismiss. The demurrer and the motion to quash challenged the jurisdiction of the Court over the "subject of the action" and "controversy at issue," respectively, and, at the same time, raised the question that the defendants were not residents of the Northern District of California. The action was one which could be brought only in the district where the defendants resided. But it was claimed that, by their demurrer and motion, they had waived the privilege of being sued only in that district. This Court said:

"It follows, therefore, that the court below was

without jurisdiction of this cause, and, as the defendants have taken no action whatever in response to the summons, except to appear specially and object to the jurisdiction, it cannot possibly be said that the objection to the jurisdiction has been waived."

The case of Southern Pacific Co. et al., v. Arlington Heights Fruit Co. et al., 191 Fed. 101 (C. C. A., 9th Cir.), is likewise directly in point. The complainants, citizens and residents of California, sued the defendants, who were for the most part railway companies, and all citizens and residents of other states, in a federal court in California, to enjoin a threatened increase in certain freight rates until their reasonableness should be passed upon by the Interstate Commerce Commission. Certain defendants appeared specially and filed pleas to the jurisdiction of the Court, in which they asserted, first, that federal jurisdiction was based upon acts of Congress relating to interstate commerce as well as upon diversity of citizenship, and that they were not citizens or inhabitants of California; second, that the Court was without jurisdiction to determine the reasonableness of the rates prior to a determination thereof by the Interstate Commerce Commission, and, third, that other connecting carriers were indispensable parties to the suit. Other defendants filed a demurrer upon several grounds, among which were that the Court had no jurisdiction of the subject matter, and that such defendants could not be sued within the jurisdiction of the

Court in which the case was pending. It was held that since diversity of citizenship was not the sole ground of federal jurisdiction the proper venue for laying the suit was in the respective districts of the residences of the defendant railway companies. It was contended, however, that the defendants had waived the privilege of being sued in the districts of their residences by combining a plea to the jurisdiction over their persons with a plea to the jurisdiction of the Court over the subject matter. In an exhaustive opinion the cases are reviewed at length, including the Fitzgerald and Mahr cases above referred to, as well as St. Louis etc. R. Co. v. McBride, 141 U. S. 127, likewise cited by petitioner. Both upon principle and upon the authority of the decision of this Court in the case of Davidson Marble Co. v. Gibson, supra, it was held that the defendants had not waived the privilege of being sued in the districts of their residence.

There is, indeed, no reason, based upon principle, why a challenge to the jurisdiction of the Court over the subject matter should constitute a waiver of a contemporaneous challenge to its territorial jurisdiction. The theory of any such waiver must be that, by voluntarily submitting himself to the jurisdiction of a court, a defendant estops himself from thereafter questioning such jurisdiction. Quite manifestly one does not voluntarily submit to the jurisdiction of a court by denying such jurisdiction upon every available ground.

We confidently assert that the right to question the

general and the territorial jurisdiction of the Court in the same pleading has been uniformly upheld and never denied. It is very certain that, from a practical standpoint, no reason exists for now departing from this established procedure. The bench and bar have been subjected to public criticism because of the technicalities and delays of legal procedure. How can a plaintiff be harmed or the functioning of the Court be impaired because a defendant interposes at the outset all objections which he may have to the Court's jurisdiction? A prompt and complete determination of all questions of jurisdiction is very much to a plaintiff's advantage. Why should a defendant be penalized because he has promptly advised the Court and his adversary of every ground upon which he insists that the Court is without jurisdiction to try and determine the suit?

In conclusion, and with great respect, it is submitted that respondent has not waived, but has properly saved, the objections to the jurisdiction of the District Court upon which it relies.

Respectfully submitted,

ALBERT H. COLE,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 173.—October Term, 1933.

James B. Moore, Petitioner, *vs.* The Chesapeake & Ohio Railway Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[February 5, 1934.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Petitioner brought this action in the District Court of the United States for the Northern District of Indiana, Fort Wayne Division, to recover for injuries which he sustained on November 29, 1930, in the course of his employment by respondent, an interstate carrier, in its yard at Russell, Kentucky. In his complaint he set forth two "paragraphs" or counts, both being for the same injuries. In the first paragraph, petitioner alleged that at the time of the injuries he was employed in interstate commerce and that he brought the action under the Acts of Congress known as the Federal Employers' Liability Act[1] and the Safety Appliance Acts,[2] and the rules and orders which the Interstate Commerce Commission had promulgated under the latter.[3] In the second paragraph, he alleged that at the time of the injuries he was employed in intrastate commerce and he invoked the Safety Appliance Acts enacted by the Congress, and the rules and orders of the Interstate Commerce Commission thereunder, and the Employers' Liability Act of Kentucky. The provisions of the laws of Kentucky which were alleged to govern the rights of the parties at the time and place in question were set forth.[4] In each count

[1]Act of April 22, 1908, c. 149, 35 Stat. 65, 45 U. S. C. secs. 51 *et seq.*; Act of April 5, 1910, c. 143, 36 Stat. 291, 45 U. S. C. sec. 56.

[2]Acts of March 2, 1893, c. 196, 27 Stat. 531, 45 U. S. C. secs. 1 *et seq.*; April 1, 1896, c. 87, 29 Stat. 85, 45 U. S. C. sec. 6; March 2, 1903, c. 976, 32 Stat. 943, 45 U. S. C. secs. 8, 9, 10; April 14, 1910, c. 160, 36 Stat. 298, 45 U. S. C. secs. 11 *et seq.*

[3]Order of March 13, 1911; Roberts' Federal Liabilities of Carriers, Vol. 2, pp. 2010, 2016.

[4]Ky. Acts, 1918, c. 52, secs. 1-3, p. 153; Garroll's Ky. Statutes, secs. 820 b-1, 820 b-2, 820 b-3.

petitioner stated that the injuries were received while he was engaged as a switchman in attempting to uncouple certain freight cars and were due to a defective uncoupling lever.

Objections to the jurisdiction of the District Court as to each count were raised by plea in abatement. They were overruled and petitioner had a general verdict. The judgment, entered accordingly, was reversed by the Circuit Court of Appeals upon the ground that the District Court was without jurisdiction to entertain the case upon either count. 64 F. (2d) 472. This Court granted certiorari. 290 U. S. —.

Distinct questions are presented with respect to each count and they will be considered separately.

First. By the first paragraph, the jurisdiction of the Federal court was rested upon the sole ground that the injury had been sustained during petitioner's employment in interstate commerce and that the cause of action arose under the pertinent Federal legislation. To support the jurisdiction of the District Court for the Northern District of Indiana, the complaint alleged that respondent was engaged in business in that district at the time of the commencement of the action. Respondent's challenge to the jurisdiction was upon the grounds (1) that at the time of the injuries petitioner was not employed in interstate commerce and hence the action would not lie under the Federal Employers' Liability Act, and (2) that respondent was a corporation organized under the laws of Virginia and an inhabitant of the Eastern District of Virginia, and hence, so far as the action rested upon the Safety Appliance Acts of Congress, and the rules and orders of the Interstate Commerce Commission, it could not be brought in a Federal court in any district other than the Eastern District of Virginia. Jud. Code, sec. 51; 28 U. S. C. sec. 112.

Petitioner's demurrer to the plea in abatement as to the first cause of action was sustained by the trial court. That court pointed out that the plea did not deny that respondent was doing business within the Northern District of Indiana and that the pleading, in substance, went to the merits. The Circuit Court of Appeals took a different view, holding that so far as petitioner relied upon a violation of the Safety Appliance Acts, the action must be brought in the district of respondent's residence. In reversing the judgment, the Circuit Court of Appeals remanded the cause with instructions to grant permission to petitioner to amend

his first paragraph to conform exclusively to the theory of a violation of the Federal Employers' Liability Act.

This ruling of the appellate court cannot be sustained. The jurisdiction of the District Court is to be determined by the allegations of the complaint. *Mosher* v. *Phoenix,* 287 U. S. 29, 30; *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103, 105. These allegations clearly set forth, in the first paragraph, a cause of action under the Federal Employers' Liability Act. Every essential ingredient of such a cause of action was appropriately alleged. The Federal Employers' Liability Act expressly recognized that in an action brought under its provisions the question of a violation of the Safety Appliance Acts might be presented and determined. This is the unmistakable effect of the provisions that, in such an action, the employee shall not be held "to have been guilty of contributory negligence", or "to have assumed the risks of his employment" in any case "where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee". Act of April 22, 1908, secs. 3, 4, 45 U. S. C. secs. 53, 54. By the phrase "any statute enacted for the safety of employees" the Congress evidently intended to embrace its Safety Appliance Acts. *Seaboard Air Line Railway* v. *Horton,* 233 U. S. 492, 503. This Court has said that the statutes are *in pari materia* and that "where the Employers' Liability Act refers to 'any defect or insufficiency, *due to its negligence,* in its cars, engines, appliances,' etc., it clearly is the legislative intent to treat a violation of the Safety Appliance Act as 'negligence'—what is sometimes called negligence *per se.*" *San Antonio Railway & Aransas Pass Rwy. Co.* v. *Wagner,* 241 U. S. 476, 484. Where an employee of an interstate carrier sustains injuries while employed in the interstate commerce of the carrier, his action may thus be brought under the Federal Employers' Liability Act in connection with the Safety Appliance Acts.[5]

[5]See Southern Railway Co. *v.* Crockett, 234 U. S. 725, 727; St. Louis & San Francisco R. R. Co. *v.* Conarty, 238 U. S. 243, 248; Great Northern Railway Co. *v.* Otos, 239 U. S. 349, 350; San Antonio & Aransas Pass Rwy. Co. *v.* Wagner, 241 U. S. 476, 484; Spokane & Inland R. R. Co. *v.* Campbell, 241 U. S. 497, 498; Atlantic City R. R. Co. *v.* Parker, 242 U. S. 56, 58; St. Joseph & G. I. Rwy. Co. *v.* Moore, 243 U. S. 311, 312; Minneapolis & St. Louis R. R. Co. *v.* Gotschall, 244 U. S. 66; Great Northern Rwy. Co. *v.*

Under the Federal Employers' Liability Act an action may be brought "in a District Court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action". 45 U. S. C. sec. 56. It follows that, upon the allegations of the complaint, the action on the claim set forth in the first paragraph was properly brought in the District Court for the Northern District of Indiana where respondent was doing business when the action was begun.

Second. In the second paragraph of the complaint, which treated the injuries as received in intrastate commerce, diversity of citizenship was alleged; that petitioner was a citizen of Indiana, and a resident of the city of Fort Wayne in that State, and that respondent was a citizen of Virginia doing business in Indiana. The plea in abatement, admitting respondent's citizenship in Virginia, denied that petitioner was a resident of Fort Wayne or of the Northern District of Indiana, or was a citizen of that State, and alleged that as the cause of action set forth in the second paragraph arose under the Federal Safety Appliance Acts, the action could not be brought in any district other than the Eastern District of Virginia. The District Court took evidence on the issue of fact, found that the petitioner was a citizen of Indiana and a resident of Fort Wayne, and overruled the plea. The Circuit Court of Appeals held that the District Court of the Northern District of Indiana was without jurisdiction, in the view that the second count attempted to set forth a cause of action "under the Federal Safety Appliance Act as well as under the statutes of Kentucky" and hence that jurisdiction did not rest solely on diversity of citizenship. Jud. Code, sec. 51, 28 U. S. C. sec. 112. In remanding the cause, the Circuit Court of Appeals directed that petitioner be allowed to amend the second paragraph of his complaint so as to conform exclusively to the theory of a violation of the Kentucky statute.

While invoking, in the second count, the Safety Appliance Acts, petitioner fully set forth and relied upon the laws of the State of Kentucky where the cause of action arose. In relation to injuries

Donaldson, 246 U. S. 121, 124; Davis *v.* Wolfe, 263 U. S. 239, 240; Baltimore & Ohio R. R. Co. *v.* Groeger, 266 U. S. 521, 528; Chicago, Great Western R. R. Co. *v.* Schendel, 267 U. S. 287, 289; Minneapolis, St. Paul & Sault Ste. Marie Rwy. Co. *v.* Goneau, 269 U. S. 406, 407.

received in that State in intrastate commerce, aside from the particular bearing of the Federal Safety Appliance Acts, the liability of respondent was determined by the laws of Kentucky. *Slater* v. *Mexican National R. R. Co.*, 194 U. S. 120, 126; *Cuba R. R. Co.* v. *Crosby*, 222 U. S. 473, 478; *Young* v. *Masci*, 289 U. S. 253, 258; *Ormsby* v. *Chase*, 290 U. S. —. The statute of Kentucky, in prescribing the liability of common carriers for negligence causing injuries to employees while engaged in intrastate commerce, reproduced in substance, and with almost literal exactness, the corresponding provisions of the Federal Employers' Liability Act as to injuries received in interstate commerce. Ky. Acts, 1918, c. 52, secs. 1-3, p. 153; Carroll's Ky. Statutes, 1930, secs. 820 b-1, 820 b-2, 820 b-3. The Kentucky Act provided that no employee should be held "to have been guilty of contributory negligence" or "to have assumed the risk of his employment" in any case "where the violation by such common carrier of any statute, state or federal, enacted for the safety of employees contributed to the injury or death of such employee". *Id.* The Kentucky legislature read into its statute the provisions of statutes both state and federal which were enacted for the safety of employees, and the Federal Safety Appliance Acts were manifestly embraced in this description. *Louisville & Nashville R. R. Co.* v. *Layton*, 243 U. S. 617, 619. Thus, the second count of the complaint, in invoking the Federal Safety Appliance Acts, while declaring on the Kentucky Employers' Liability Act, cannot be regarded as setting up a claim which lay outside the purview of the state statute. As in the analogous case under the Federal Employers' Liability Act, a violation of the acts for the safety of employees was to constitute negligence *per se* in applying the state statute and was to furnish the ground for precluding the defense of contributory negligence as well as that of assumption of risk.

The Circuit Court of Appeals took the view that if it were assumed that the second count was based exclusively upon the Kentucky statute, that statute and the Federal requirements could not be considered as being *in pari materia* because the latter applied only to interstate commerce, and that, if the petitioner was permitted to establish the negligence required by the state statute by showing the violation of the Federal requirements the court would thereby be placed "in the anomalous position of extending the benefits of the Safety Appliance Act to intrastate commerce".

This is an erroneous view. The original Safety Appliance Act of March 2, 1893, 27 Stat. 531, did not embrace all cars on the lines of interstate carriers but only those engaged in interstate commerce. *Brinkmeier* v. *Missouri Pacific Rwy. Co.*, 224 U. S. 268. By the amending Act of March 2, 1903, 32 Stat. 943, the scope of the statute was enlarged so as to include all cars "used on any railroad engaged in interstate commerce". The statute as amended was intended to embrace all locomotives, cars, and similar vehicles used on any railroad which is a highway of interstate commerce. *Southern Railway Co.* v. *United States*, 222 U. S. 20. With respect to such vehicles, the duty to protect employees by the prescribed safety appliances exists even though the vehicles and the employee injured through the failure to provide such protection are at the time engaged in intrastate commerce. *Texas & Pacific Railway Co.* v. *Rigsby*, 241 U. S. 33; *Louisville & Nashville R. R. Co.* v. *Layton, supra.* The Federal Act in its application to such a case is thus *in pari materia* with the statute of Kentucky which prescribes the liability of carriers for injuries to employees while employed in intrastate commerce and which, in effect, reads into the provisions of the statute the requirements of the Federal Act for the safety of employees. There appears to be no anomaly in enforcing the state law with this defined content.

The Federal Safety Appliance Acts prescribed duties, and injured employees are entitled to recover for injuries sustained through the breach of these duties. *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1; *St. Louis, Iron Mountain & Southern Rwy. Co.* v. *Taylor*, 210 U. S. 281; *Texas & Pacific Rwy. Co.* v. *Rigsby, supra.* Questions arising in actions in state courts to recover for injuries sustained by employees in intrastate commerce and relating to the scope or construction of the Federal Safety Appliance Acts are, of course, federal questions which may appropriately be reviewed in this Court. *St. Louis, Iron Mountain & Southern Rwy. Co.* v. *Taylor, supra; Louisville & Nashville R. R. Co.* v. *Layton, supra.* But it does not follow that a suit brought under the state statute which defines liability to employees who are injured while engaged in intrastate commerce, and brings within the purview of the statute a breach of the duty imposed by the Federal statute, should be regarded as a suit arising under the laws of the United States and cognizable in the Federal court in the absence of diversity of citizenship. The Federal Safety Ap-

pliance Acts, while prescribing absolute duties, and thus creating correlative rights in favor of injured employees, did not attempt to lay down rules governing actions for enforcing these rights. The original Act of 1893 made no provision for suits, except for penalties. That Act did impliedly recognize the employee's right of action by providing in section 8 that he should not be deemed to have assumed the risk of injury occasioned by the breach of duty. But the Act made no provision as to the place of suit or the time within which it should be brought, or as to the right to recover, or as to those who should be the beneficiaries of recovery, in case of the death of the employee. While dealing with assumption of risk, the statute did not affect the defense of contributory negligence and hence that defense was still available according to the applicable state law. *Schlemmer* v. *Buffalo, Rochester & Pittsburg Rwy. Co.*, 220 U. S. 590; *Minneapolis, St. Paul & Sault Ste. Marie Rwy. Co.* v. *Popplar*, 237 U. S. 369, 371, 372. In these respects the amended Act of 1903 made no change, notwithstanding the enlargement of the scope of the statutory requirements. The Act of 1910, by a proviso in section 4 relating to penalties (36 Stat. 299), provided that nothing in that section should "be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee" caused by the use of the prohibited equipment.

The Safety Appliance Acts having prescribed the duty in this fashion, the right to recover damages sustained by the injured employee through the breach of duty sprang from the principle of the common law (*Texas & Pacific R. R. Co.* v. *Rigsby, supra*, at pp. 39, 40[6]) and was left to be enforced accordingly, or, in case of the death of the injured employee, according to the applicable statute.[7] *St. Louis, Iron Mountain & Southern Rwy. Co.* v. *Taylor*,

[6]In Texas & Pacific R. R. Co. *v.* Rigsby, 241 U. S. 33, the action was brought in the state court and was removed to the federal court upon the ground that the defendant was a federal corporation.

[7]In St. Louis, Iron Mountain & Southern Rwy. Co. *v.* Taylor, 210 U. S. 281, 285, the Court said: "The accident by which the plaintiff's intestate lost his life occurred in the Indian Territory, where, contrary to the doctrine of the common law, a right of action for death exists. The cause of action arose under the laws of the territory, and was enforced in the courts of Arkansas". The question whether the action was triable in those courts was held not to present a Federal question, but the question as to the interpretation of the Safety Appliance Act of 1893 did present the Federal question which was reviewed by this Court.

supra, at p. 285; *Minneapolis, St. Paul & Sault Ste. Marie Rwy. Co.* v. *Popplar, supra.* When the Federal Employers' Liability Act was enacted, it drew to itself the right of action for injuries or death of the employees within its view who were engaged in interstate commerce, including those cases in which injuries were due to a violation of the Safety Appliance Acts. Such an action must be brought as prescribed in the Federal Employers' Liability Act, and if brought in the state court, it cannot be removed to the federal court, although violation of the Safety Appliance Acts is involved. See *St. Joseph & G. I. Rwy. Co.* v. *Moore*, 243 U. S. 311. With respect to injuries sustained in intrastate commerce, nothing in the Safety Appliance Acts precluded the State from incorporating in its legislation applicable to local transportation the paramount duty which the Safety Appliance Acts imposed as to the equipment of cars used on interstate railroads. As this Court said in *Minneapolis, St. Paul & Sault Ste. Marie Rwy. Co.* v. *Popplar, supra*, as to an action for injuries sustained in intrastate commerce: "The action fell within the familiar category of cases involving the duty of a master to his servant. This duty is defined by the common law, except as it may be modified by legislation. The Federal statute, in the present case, touched the duty of the master at a single point and, save as provided in the statute, the right of the plaintiff to recover was left to be determined by the law of the State".

We are of the opinion that the second paragraph of the complaint set forth a cause of action under the Kentucky statute and, as to this cause of action, the suit is not to be regarded as one arising under the laws of the United States. In view of the diversity of citizenship and the residence of petitioner, the District Court of the Northern District of Indiana had jurisdiction.

As the Circuit Court of Appeals did not consider any questions save those relating to the jurisdiction of the District Court, the judgment of the Circuit Court of Appeals will be reversed and the cause remanded to that court with directions to consider such other questions as may be presented by the appeal.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.